In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-1076

STATE OF RHODE ISLAND,
PETITIONER,

v.

THOMAS J. INNIS,
RESPONDENT.

Petition for a Writ of Certiorari to the Supreme Court of the State of Rhode Island.

DENNIS J. ROBERTS II,
Attorney General,
NANCY MARKS RAHMES,
Special Assistant Attorney General,
Chief, Criminal Appellate Division,
Providence County Courthouse,
Providence, Rhode Island 02903.

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

Table of Contents.

Table of Authorities Cited.

Cases.

CONSTITUTIONAL AND STATUTORY PROVISIONS.

In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. .

STATE OF RHODE ISLAND,
PETITIONER,

v.

THOMAS J. INNIS,
RESPONDENT.

Petition for a Writ of Certiorari to the Supreme Court of the State of Rhode Island.

Opinion Below.

The opinion of the Supreme Court of Rhode Island, not yet reported, appears in the Appendix hereto (pp. 1a-29a).

Jurisdiction.

The decision of the Supreme Court of Rhode Island was entered on August 9, 1978. A motion to reargue out of time was denied by the Supreme Court of Rhode Island on December 21, 1978. This Court has granted two extensions

of time in which to petition for a writ of certiorari, thereby extending the time in which to file the petition to and including January 6, 1979. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

Question Presented.

Whether the Supreme Court of Rhode Island used the correct federal constitutional standards in excluding a shotgun from evidence on the basis of improper interrogation and lack of intelligent waiver under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), where an arrested suspect, minutes after receiving and asserting his *Miranda* rights, volunteered to help police recover the shotgun upon overhearing a conversation between two patrolmen to the effect that the shotgun was probably hidden near an area school, and, in fact, helped recover the shotgun after once more receiving but then relinquishing his *Miranda* rights.

Constitutional Provisions Involved.

Fifth Amendment.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any

criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment.

Section 1. ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

Statement of the Case.

Prior Proceedings.

On November 12, 1975, after a jury trial, Thomas J. Innis was found guilty of kidnapping, robbery, and murder in the first degree. Prior to trial the defendant filed a motion to suppress a shotgun which had been found by the police, with the defendant's assistance, at the time of arrest. At the point when the State offered to place the shotgun into evidence, the jury was sent out and a *voir dire* was conducted. At the conclusion of the hearing the trial judge made findings of fact and rulings of law on the motion to suppress and concluded that the shotgun was admissible (App. 30a-34a).

On appeal, the Supreme Court of Rhode Island reversed and set aside the trial judge's ruling on the admissibility of the shotgun. *State of Rhode Island* v. *Thomas J. Innis* (App. 1a-29a). The case was remanded to the lower court for a new trial.

Statement of Facts.

On January 16, 1975, the body of John Mulvaney, a cab driver, was found in a shallow grave in Coventry, Rhode Island. Death resulted from a shotgun blast to the back of the head. Thomas J. Innis was sought as a suspect.

On January 17, 1975, shortly after midnight, the police received a report from a cab driver that Innis had been dropped off in the Mount Pleasant area of Providence, Rhode Island, and was carrying a sawed-off shotgun. The Providence police began a search of the area. At approximately 4:30 A.M. Patrolman Lovell apprehended the defendant, placed him under arrest, searched for weapons, and advised him of his *Miranda* rights. The defendant said he understood these rights. Shortly thereafter Sergeant Sears arrived at the scene and again advised Innis of his constitutional rights under *Miranda*. Finally, Captain Leyden arrived and once more advised him of his *Miranda* rights. In response to the Captain's warnings the defendant stated that he wanted an attorney. The Captain then directed three officers to place the defendant in the caged wagon and transport him to Central Station. They were also directed not to question the defendant in any way.

While en route to the Central Station Patrolman Gleckman, who had been on the force less than two years, began a conversation with Patrolman McKenna. The defendant could hear this conversation. Patrolman Gleckman stated:

> "A. At this point, I was talking back and forth with Patrolman McKenna stating that I frequent this area while on patrol and there's a lot of handicapped children running around in this area, and God forbid one of them might find a weapon with shells and they might hurt themselves.

> "Q. Who were you talking to?
> "A. Patrolman McKenna.
> "Q. Did you say anything to the suspect Innis?
> "A. No, I didn't.
> "Q. Did he say anything to you prior to this?
> "A. At this point he stated 'stop'.
> "Q. No. My question, prior to your saying that, had the defendant said anything?
> "A. No.
> "Q. Had anybody said anything to him?
> "A. No.
> "Q. And you were talking to Patrolman McKenna?
> "A. Right.
> "Q. And what happened next?
> "A. At that point, as I was saying, there is kids running around there, as it is a handicapped school, and he says, you know, back and forth with Patrolman McKenna, he at this point said: 'Stop, turn around, I'll show you where it is.' At this point, Patrolman McKenna got on the mike and told the captain: 'We're returning to the scene of the crime, or where the weapon might be, and the subject is going to show us where it will be.'

Patrolman McKenna radioed Captain Leyden and informed him they were returning to the scene of the arrest to locate the weapon. The car had traveled less than a mile at the time of this statement and they returned to the arrest scene at Obadiah Brown Road within minutes of leaving.

Innis alighted from the wagon and Captain Leyden again advised him of his rights. Innis said he understood those rights but wanted to show them where the gun was because of the school that was in the area and the "small kids around." He was placed in the wagon and all the cars proceeded to a nearby

field. The defendant at first had trouble finding the weapon, finally locating it under some rocks along the side of Obadiah Brown Road.

The defendant did not dispute any of these facts either at trial or on appeal. The trial judge ruled that the shotgun was admissible, a copy of which ruling is appended hereto (App. 30a-34a).

The defendant was found guilty by a jury of murder, kidnapping, and robbery. He was sentenced to life imprisonment for the murder and received concurrent sentences of 20 years for the kidnapping and 30 years for the robbery. The defendant appealed his conviction to the Supreme Court of Rhode Island.

Seven issues were raised on appeal. The Supreme Court of Rhode Island sustained the defendant's appeal, with two of the five justices dissenting. The ruling was based solely upon two of the issues raised.[1] The majority found that the defendant had exercised his *Miranda* right to counsel and that Patrolman Gleckman's statement constituted interrogation without a valid waiver from the defendant of his *Miranda* rights. The court also concluded that, irrespective of the fourth set of warnings given by Captain Leyden, the seizure of the gun was the product of the improper remarks of Patrolman Gleckman and should have been suppressed as "fruit of the poisonous tree." The majority's decision was grounded solely upon the Federal Constitution as interpreted by various federal and state decisions.

[1] The State Supreme Court also ruled that a defendant may not be convicted of both murder in the first degree under a felony murder theory and the underlying felony. The State does not seek review of this holding.

Reasons for Granting the Writ.

Introduction.

The petitioner argues the following reasons why this petition for writ of certiorari should be granted:

1. The decision rests solely upon the Constitution of the United States.
2. The decision of the Rhode Island Supreme Court is based upon an erroneous expansion of *Brewer* v. *Williams*, 430 U.S. 387 (1977), *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and *Massiah* v. *United States*, 377 U.S. 201 (1964), which is not in accord with applicable decisions of this Court and conflicts with other state and federal decisions.
3. The decision of the Rhode Island Supreme Court represents an unwarranted expansion of the exclusionary rule enunciated in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), which conflicts with the spirit of *Michigan* v. *Tucker*, 417 U.S. 433 (1974).

I. The Decision Rests Solely Upon the Constitution of the United States.

There are no valid, independent state grounds for the decision reached by the Supreme Court of Rhode Island. Therefore, the doctrine expressed in *Jankovich* v. *Toll Road Comm'n*, 379 U.S. 487 (1965), is not applicable. Further, there is no need to remand this case to the Supreme Court of Rhode Island for clarification of its opinion. *Ohio* v. *Gallagher*, 425 U.S. 257 (1976). Each of the state cases cited by the Rhode Island Supreme Court in its decision rested solely on federal constitutional grounds.

II. The Court Below Improperly Extended the Requirements of Miranda v. Arizona, 384 U.S. 436 (1966), to a Situation Where No Custodial Interrogation Took Place.

The Supreme Court of Rhode Island held that Innis had been improperly interrogated within the meaning of *Brewer* v. *Williams*, 430 U.S. 387 (1977), in violation of his request for counsel under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The interrogation allegedly occurred when Patrolman Gleckman commented to Patrolman McKenna on the probability that a child from a nearby school might find the missing shotgun. The State argues that this conclusion was erroneous as a matter of federal constitutional law.

The State Supreme Court took the position that if a defendant makes a statement after asserting his *Miranda* rights then it must be the result of compulsion, subtle or otherwise. The majority reasoned that *Brewer* v. *Williams*, *supra*, had expanded the "concept of interrogation" and that in light of this expanded definition and in light of the factual similarity of the two cases, they were justified in viewing the comments of the officers as interrogation and in rejecting the defendant's subsequent waiver of *Miranda* rights. Logically, this decision precludes, as a matter of federal constitutional law, the existence of voluntary and spontaneous statements once a defendant has asserted his *Miranda* rights and also precludes any subsequent waiver of those rights. Such a conclusion is contrary to decisions of this Court. *Miranda* v. *Arizona*, *supra*, at 478; *Michigan* v. *Mosley*, 423 U.S. 96, 102 (1975). As the dissenters in the case at bar noted, *Miranda* does not require that police assume the roles of contemplative monks or that suspects be transported and confined in sterile atmospheres free from any and all oral and visual stimuli which might

cause them to reconsider a previous assertion of the *Miranda* rights.

The State Supreme Court's initial premise that *Brewer* "substantially expanded the concept of interrogation" was erroneous. This Court had previously recognized and condemned the psychological technique employed by the Iowa police during the car trip. *Miranda* v. *Arizona*, *supra*; *Escobedo* v. *Illinois*, 378 U.S. 478 (1964); *Lynumn* v. *Illinois*, 372 U.S. 528 (1963); *Spano* v. *New York*, 360 U.S. 315 (1959). Consequently, the position taken in *Brewer* was neither innovative nor expansionistic.

Furthermore, the interrogation which took place in *Brewer* is not analogous to the sequence of events which took place in the case at bar. It is clear from the record in *Brewer*, a Sixth Amendment case, that the defendant was deliberately isolated from counsel *after arraignment* and from any outside contact, and that the detective's comments were specifically directed to the defendant and deliberately worded in a manner thought to appeal to the emotions and known weaknesses of the defendant solely in an effort to produce incriminating responses. In the case at bar, a Fifth Amendment case, the challenged comments were directed to a fellow officer in a casual, off-hand manner as the group made the short drive to the police station moments after the arrest and *prior to arraignment*. These remarks were not surreptitious as in *Massiah* v. *United States*, *supra*, or preplanned and deliberate as in *Brewer*. Indeed, only a cynic could conclude that Gleckman, a patrolman with less than two years on the force, planned and executed the "ploy" during the three to five minutes between the time he was assigned to the wagon by Captain Leyden and the point when Innis volunteered to locate the shotgun. Where the record is devoid of any indication that Gleckman intended to elicit incriminating statements from Innis, it was erroneous for

the lower court to consider *Brewer* v. *Williams*, *supra*, dispositive on this issue and to find that Innis was interrogated.

In the case at bar the record is barren of any indication that Innis was abused, threatened, coerced or tricked into revealing the location of the gun. After he directed the officers to turn the car around nothing more was said. Upon their return to the scene, Innis stepped out of the car and was again advised of his *Miranda* rights by Captain Leyden. Innis expressly acknowledged that he understood these rights but nevertheless wished to retrieve the gun. The State Supreme Court's conclusion that Innis had been interrogated extends the meaning of the term "interrogated" to the point of absurdity. Their conclusion erroneously applies principles of federal constitutional law to the undisputed facts of this case.

III. Physical Evidence, Located and Seized as a Result of a Statement Obtained in Violation of Miranda v. Arizona, 384 U.S. 436 (1966), is Not Per Se Inadmissible.

The Supreme Court of Rhode Island held that in spite of the receipt of renewed *Miranda* warnings by the defendant after he returned to the scene of the arrest and in spite of his affirmative waiver of those rights, the location and seizure of the shotgun were the product of Patrolman Gleckman's improper comments and the gun was therefore inadmissible as "fruit of the poisonous tree." *Wong Sun* v. *United States*, 371 U.S. 471 (1963). Assuming arguendo that the patrolman's "observation" constituted "interrogation," the State Supreme Court's conclusion that the shotgun was inadmissible as a matter of federal constitutional law was erroneous. *Wong Sun*, of course, is a Fourth Amendment case whose rationale has never been extended to the Fifth Amendment. The State submits that the lower court in this case erroneously adopted a per se

approach to the exclusionary rule of *Miranda*. This approach expands *Miranda* beyond the boundaries of that decision and conflicts with the other rulings of this Court.

This Court ruled in *Harris* v. *New York*, 401 U.S. 222 (1971), that an accused's statement taken in violation of *Miranda* could be used to impeach the direct testimony of the accused at trial. The Court stated:

> "It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards." 401 U.S. at 224.

Three years later, in *Michigan* v. *Tucker*, 417 U.S. 433 (1974), this Court held admissible at trial the testimony of a witness whose existence had been discovered as a result of a defendant's statement, despite the fact that the statement had been obtained in violation of defendant's *Miranda* rights. See also *Oregon* v. *Hass*, 420 U.S. 714 (1975); *United States* v. *Janis*, 428 U.S. 433 (1976).

The State submits that *Michigan* v. *Tucker* is controlling in this case and that the shotgun was properly admitted into evidence. In *Michigan* v. *Tucker*, a case involving a pre-*Miranda* arrest, this Court reasoned that the officers could not be faulted for failing to give warnings which did not measure up to the *Miranda* standards. Since the defendant's statement had been excluded from evidence, no purpose would have been served by excluding the evidence located as a result of the statement.[2] Similarly, in the case at bar, the officers' strict

[2] In the case at bar, the defendant only requested that the shotgun be excluded from evidence. His statements to the police were never themselves challenged.

and immediate compliance with the *Miranda* requirements demonstrates that they acted in complete good faith and without fault. Certainly, no officer could have anticipated, or could have been expected to anticipate, that *Miranda* forbade the casual observation which Patrolman Gleckman made to his fellow officer. Secondly, as in *Michigan* v. *Tucker*, the evidence obtained in the case at bar as a result of defendant's statement is highly reliable. Since real evidence carries with it greater indicia of trustworthiness than oral testimony, *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 250 (1973) (Powell, J., concurring), there is even greater reason supporting admission of the gun than that which existed in *Tucker* supporting the admission of the oral testimony of the alibi witness.

The purpose behind the exclusionary rule would not be served by excluding the weapon seized in this case. The exclusionary rule was designed primarily to deter police misconduct.

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. . . . Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." *Michigan* v. *Tucker*, *supra*, at 447.

There are no indicia of deliberate police misconduct in the case at bar. Innis received *Miranda* warnings from three different officers in succession before he was placed in the police wagon. Captain Leyden had instructed the officers not to question him. The record is devoid of any indication that Innis was treated abusively. Nor was there any compulsion for Innis to follow through with his initial spontaneous offer of

assistance for, after the wagon returned to the scene of the arrest, Innis was once more given the *Miranda* warnings. The defendant said he understood but wished to show the officers where the gun was hidden. The only police conduct which even hints at interrogation was one statement made by one police officer to another concerning the location of a school in the area and the likelihood of a child locating the gun before the police did. Because the police believed they had fully complied with *Miranda*, no useful purpose of the exclusionary rule would be served by the exclusion of the gun. Innis was never intimidated or tricked into revealing the location of the weapon. The record makes it clear that the police were striving to ensure that the defendant's rights were protected and there is no indication that Innis perceived the situation as otherwise. Assuming that Officer Gleckman's observation constituted unlawful interrogation, the suppression of defendant's response to that observation is sufficient judicial sanction.

Since the police activity was conducted in complete good faith, and where the evidence obtained is trustworthy and highly reliable, the exclusion of the gun from evidence as fruit of the improper remarks by the officer would serve no valid purpose, and would have no deterrent effect. The application of the *Wong Sun* rationale by the Rhode Island Supreme Court violates the logic of *Michigan* v. *Tucker* and the purpose behind the rules enunciated in *Miranda* v. *Arizona*.

Conclusion.

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DENNIS J. ROBERTS II,
Attorney General,
NANCY MARKS RAHMES,
Special Assistant Attorney General,
Chief, Criminal Appellate Division,
Providence County Courthouse,
Providence, Rhode Island 02903.

STATE OF RHODE ISLAND
AND PROVINCE PLANTATIONS

SUPREME COURT

STATE

v. No. 75-333-C.A.

THOMAS J. INNIS

Opinion

August 9, 1978

DORIS, J. The defendant, Thomas J. Innis, was tried before a justice of the Superior Court, sitting with a jury, on an indictment charging him with murder, kidnapping and robbery.[1] The jury returned verdicts of guilty on all three counts. The defendant was sentenced to life imprisonment for the murder and received concurrent sentences of 20 years for the kidnapping and 30 years for the robbery. The defendant appeals.

The case presented by the state at trial was built primarily on circumstantial evidence. The testimony revealed that defendant had been picked up by a taxi on the evening of January 12, 1975, in Providence. On January 16, 1975, the body of the cab driver was found in a shallow grave in Coventry. Death resulted from a shotgun blast to the back of the head. Witnesses testified that defendant made statements implicating himself in the crime, and the state presented evidence that de-

[1] The indictment initially contained six counts. One count was severed and passed at the beginning of trial. The remaining two counts were merged and passed at the close of the state's case.

fendant was seen in possession of a sawed-off shotgun prior to the commission of the crime. A sawed-off shotgun was introduced into evidence by the state.

The defendant brings several claims of error before us on appeal. Based upon our view of this case, we need only address two of defendant's contentions.

The initial assignment of error we address is defendant's claim that the trial justice erred in denying defendant's motion to suppress evidence obtained in violation of his fifth amendment rights.

The evidence presented by the state at the suppression hearing indicated that defendant was apprehended by Patrolman Robert M. Lovell of the Providence Police Department early on the morning of January 17, 1975. Lovell placed defendant under arrest and advised him of his constitutional rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Sergeant Francis J. Sears then arrived at the scene of the arrest, and he also gave defendant his *Miranda* warnings.

Responding to the call that defendant had been apprehended, Captain John J. Leyden arrived and again advised defendant of his rights. In response to the warnings given by Leyden, defendant stated that he wanted to see an attorney. At this point Leyden had defendant placed in a police wagon for transportation to police headquarters. Three Providence police officers, Joseph Gleckman, Walter Williams and Richard McKenna, were assigned to the station wagon. Leyden ordered the three patrolmen not to question or coerce defendant in any way.

The patrolmen placed defendant in the station wagon and began their journey to the police station.[2] Once in the wagon,

[2] At the suppression hearing on defendant's motion to suppress the shotgun and the evidence related to its discovery, there was some discrepancy in the testimony of the three patrolmen as to their seating arrangements in the wagon. Gleckman and Williams both testified that McKenna drove the vehicle. Gleckman sat with him in the front seat, and Williams was in the rear of the vehicle with defendant. McKenna, however, testified that he was sitting in the front seat with Williams, who was driving, while Gleckman was in the back with defendant.

Gleckman began a conversation with McKenna concerning the missing shotgun. Gleckman informed McKenna that there was a school for handicaped children in the area, and he expressed the fear that one of the children might find the weapon and injure himself. The defendant, who was clearly able to hear the entire conversation, asked the police to return to the scene of the arrest so that he could show them where the shotgun was hidden. It is undisputed that at no time were any questions asked of defendant before he offered to lead police to the weapon.

The police wagon, which had traveled approximately one-half to one mile from the scene of the arrest, was driven back to that area, where a search for the shotgun was in progress. Upon returning, defendant was again advised of his rights by Captain Leyden. Leyden then asked defendant if he understood his rights, whereupon defendant answered that he did, and that he wanted to show the police where the weapon was hidden. The defendant then led police to the hidden shotgun and shells, which were later introduced into evidence at trial over defendant's objection.

The defendant asserts that the introduction of the sawed-off shotgun and shells, as well as the testimony of the police officers relating to the discovery of the evidence, violated both his right against self-incrimination and his right to counsel.

We turn to defendant's fifth amendment claim. There can be no doubt that an accused possesses an absolute right to consult an attorney before being subjected to police interrogation. *Miranda v. Arizona, supra*; *State v. Kachanis*, R.I. , 379

A. 2d 915, 916 (1977); *State v. Lachapelle*, 112 R.I. 105, 111, 308 A. 2d 467, 470 (1973). There is no dispute that defendant requested to see a lawyer after being initially advised of his rights by Captain Leyden; and clearly, the incriminating evidence was located by police with defendant's asssistance prior to his consulting an attorney. The issues we address, therefore, are (1) whether defendant was "interrogated" within the meaning of *Miranda* prior to leading police to the shotgun, and (2) if so, whether he submitted to that interrogation voluntarily by waiving his right against self-incrimination. There is no dispute that defendant was in custody.

The guidelines set down by the United States Supreme Court regarding police questioning are straightforward and unambiguous:

> "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. * * * If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. * * *
>
> "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Miranda v. Arizona, supra* at 473-75, 86 S. Ct. at 1627-28, 16 L. Ed. 2d at 723-24.

We have strictly and conscientiously applied the teachings of the *Miranda* decision. *See, e.g., State v. Travis*, 116 R.I. 678, 360 A.2d 548 (1976); *State v. Lachapelle, supra.*

Since *Miranda*, the traditional notions of both "custody" and "interrogation" have been gradually expanded to meet the changing techniques and tactics of law enforcement personnel. With respect to interrogation, we have held that, under certain circumstances, even casual conversation can be interrogation when it is initiated under false pretenses for the purpose of obtaining incriminating statements. *See State v. Travis, supra.*

The expansion of the concept of interrogation has most recently been undertaken by the United States Supreme Court in *Brewer v. Williams*, 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed 2d 424 (1977).

In *Brewer*, the suspect Williams was arrested and arraigned in Davenport, Iowa, on a charge of abducting a small child, whom police were unable to locate after arresting the defendant. Williams was represented by counsel in Davenport and in Des Moines, where the offense was committed. Both lawyers advised Williams not to make any statements to the police until he had been transported to Des Moines and had consulted his attorney there. Two police officers were assigned to drive Williams from Davenport to Des Moines.

During the course of the journey, one of the police officers began directing statements toward the suspect, who was asked not to respond, on the subject of the child's need for a Christian burial. At this point Williams had been given his *Miranda* warnings three times but had expressed no willingness to discuss the case and had in fact already told police that he would

talk with them after consulting his Des Moines lawyer. However, as a result of the officer's remarks, Williams made several incriminating statements and then led police to the victim's body.

Williams was convicted in state court and his conviction was affirmed by the Iowa Supreme Court. He then petitioned for a writ of habeas corpus in federal court. The District Court ruled that the evidence of the events which transpired during the automobile trip was wrongly admitted against Williams because the statements were obtained in violation of both Williams' fifth and sixth amendment rights. *Williams v. Brewer*, 375 F. Supp. 170 (S.D. Iowa 1974). That decision was affirmed by the Court of Appeals. *Williams v. Brewer*, 509 F. 2d 227 (8th Cir. 1974).

The Supreme Court decided the case strictly on sixth amendment grounds and held that Williams' right to counsel had been violated by the so-called "Christian burial speech," given to him by the police officer. The Court, however, specifically upheld the lower court ruling that the speech was, in effect, a form of interrogation. *Brewer v. Williams, supra* at 400, 97 S. Ct. at 1240, 51 L. Ed. 2d at 437. The Supreme Court decision noted that Williams' constitutional claim to counsel would not "have come into play if there had been no interrogation." *Id.*

While there are several factors relating to the *Brewer* remarks which distinguish that case from the one before us, we find the differences to be constitutionally insignificant. To otherwise would be "to play games with an individual's constitutional guarantees." *State v. Travis, supra* at 682-83, 360 A.2d at 551.

As the Supreme Court has noted, absent a valid waiver, any statement taken after a suspect invokes his fifth amendment rights "cannot be other than the product of compulsion, subtle or otherwise." *Miranda v. Arizona, supra* at 474, 86 S. Ct. at

1628, 16 L. Ed. 2d at 723. We do not accept the argument that Officer Gleckman's remarks do not constitute interrogation because he was expressing only a concern for public safety and not intentionally attempting to solicit evidence of an incriminating nature. We have already held that evidence obtained by a police officer from a suspect for the purpose of self-protection of the officer in the absence of legal counsel or of a valid waiver may not be used against the suspect at trial. *State v. Vargus*, R.I. , 373 A.2d 150 (1977). Public safety, like self-defense certainly a subject foremost in the mind of a police officer, nevertheless must not be permitted to become a vehicle for violating a suspect's constitutional rights.

We also reject the contention that no interrogation occurred because defendant was not addressed personally. The police officers in the wagon chose not to discuss sports or the weather but the crime for which defendant was arrested. The defendant, alone in a police wagon with three officers at 4 a.m., underwent the same psychological pressures which moved Williams to lead police to the body of his victim. Police officers in such a situation must not be permitted to achieve indirectly, by talking with one another, a result which the Supreme Court has said they may not achieve directly by talking to a suspect who has been ordered not to respond. The same "subtle compulsion" exists.

On the facts before us, we believe that defendant was interrogated within the meaning of *Miranda* in the absence of counsel after requesting to see an attorney. Unless a valid waiver occurred, the statements of Officer Gleckman constituted an infringement of defendant's right against self-incrimination. We therefore turn to a discussion of waiver.

It is well settled that whenever a defendant decides to forgo a right guaranteed by the fifth amendment, the alleged waiver must meet the strict standard of an intentional relinquishment or abandonment of a known right. *Johnson v. Zerbst*, 304

U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461, 1466 (1938); *State v. Vargus, supra* at , 373 A.2d at 154. A waiver of defendant's right to remain silent must be made voluntarily, knowingly and intelligently. *Miranda v. Arizona, supra* at 444, 86 S. Ct. at 1612, 16 L. Ed. 2d at 707. Courts will entertain every reasonable presumption against the waiver of a fundamental constitutional right, *Johnson v. Zerbst, supra*, by placing a "heavy burden" on the state to establish that such a waiver occurred. *Miranda v. Arizona, supra* at 475, 86 S. Ct. at 1628, 16 L. Ed. 2d at 724; *State v. Vargus, supra* at , 373 A.2d at 154.

The evidence presented at the suppression hearing makes it apparent that defendant received his *Miranda* warnings on three occasions prior to being subjected to Officer Gleckman's remarks and that he received his warnings once more before leading police to the shotgun. No one denies that defendant, upon receiving his warnings for the third time, requested to see a lawyer.

The trial justice concluded that the statements made by defendant, and his willingness to assist police in locating the weapon, were not the products of coercion or threats but were made voluntarily and therefore constituted a waiver of defendant's constitutional rights. The trial justice stated:

> "In the automobile, driving along Chalkstone Avenue, we have three officers who are out at four in the morning, or later, and have been prowling around searching for a weapon which they had reason to believe was there. The weapon was either loaded or with shells. It is in the area of a school where when daylight arrives handicapped and retarded children will be coming to the area. I think it is entirely understandable that they would voice their concern to each other. And I have to say that I commend the defendant for responding to the danger which, more than

> likely, he did not know of up until that time. There is no reason for me to believe, and no evidence on which I should conclude, that he was familiar with the area and the type of facilities that were there. So the defendant responded out of a very commendable concern to a situation that he became acquainted with. I commend him for it. He responded and then said: 'Turn around, take me back and I will show you where the weapon is.'
>
> "It was a waiver, clearly, and on the basis of the evidence that I have heard, an intelligent waiver, of his right to remain silent. And for whatever reason, whatever motivates people, as long as it is not the result of threat or coercion, it is a waiver for all purposes, and the weapon was found."

This is not a case where a defendant voluntarily confesses to a crime or admits to incriminating evidence on his own. The defendant's statement to the police admittedly occurred only after his being subjected to Officer Gleckman's remarks, remarks which were highly improper in light of the fact that defendant had not been given an opportunity to consult with his attorney.

The finding of a waiver in this situation would be highly inconsistent with the conduct of defendant, who just minutes before had chosen to exercise his right to counsel before being subjected to questioning. *See State* v. *Lachapelle, supra* at 111, 308 A.2d at 470. The record before us lacks any evidence that defendant ever disavowed his request to speak to an attorney or specifically waived any of his *Miranda* rights while in the police wagon; nor did he request an opportunity to discuss the case with one of the officers before Officer Gleckman's remarks. There is *no* evidence in the record before us indicating that defendant *affirmatively* waived his

fifth amendment rights at this time other than the fact that he ultimately agreed to assist the police in locating the incriminating evidence. *Id.* at 111-12, 308 A.2d at 470-71. As the Supreme Court has stated:

> "An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." *Miranda* v. *Arizona*, *supra* at 475, 86 S. Ct. at 1628, 16 L. Ed. 2d at 724.

The facts of the case at bar relating to the waiver issue dovetail the *Brewer* case with minor exceptions up to the point at which defendant received the second warning from Captain Leyden, a warning Williams never received. Because of the lack of any affirmative evidence other than the ultimate incriminating statement, all three federal courts found Williams had not waived his constitutional rights. It is true that Williams was known to police as a former mental patient and a deeply religious individual; we find no such evidence regarding defendant. However, this distinction would be relevant only if the federal courts at some stage of the proceedings had found Williams to be mentally incompetent to make such a waiver. No such finding was made.

The fourth warning received by defendant presents us with an issue not addressed in *Brewer*, however. In response to the warning given by Captain Leyden subsequent to the incriminating statement but prior to the discovery of the weapon, defendant stated that he understood his rights but wished to

show police where the shotgun was hidden so that no child in the area would find it and injure himself. At this point, defendant led the police to the sawed-off shotgun that was subsequently introduced into evidence at trial over his objection.

We find no merit in the argument that, while defendant's statement in the police wagon must be suppressed, the shotgun itself is admissible evidence on the grounds that defendant waived his *Miranda* rights in response to Captain Leyden's warnings before he led police to the weapon.

In our view, to allow the shotgun to be admitted into evidence would be to allow the state to benefit from the illegal actions which occurred in the police wagon. The seizure of the weapon was the product of the improper remarks of Officer Gleckman. Because of this inescapable fact, the weapon and any evidence leading to its discovery must be suppressed as "fruit of the poisonous tree." We have no doubt that the discovery of the shotgun occurred as a result of an "exploitation" of the original illegality. *Wong Sun* v. *United States*, 371 U.S. 471, 487-88, 83 S. Ct. 407, 417, 9 L. Ed. 2d 441, 455 (1963).

Having reached the conclusion that both the shotgun and defendant's statements were obtained in violation of defendant's fifth amendment rights, we must set aside the conviction and order a new trial unless we are convinced that the error was harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); *State* v. *Lachapelle*, *supra*.

A review of the trial transcript, however, convinces us that the tainted evidence was certainly a contributing factor in the conviction of defendant, particularly in light of the fact that most of the other evidence against defendant was circumstantial in nature. The state has not met its burden of

proving harmlessness beyond a reasonable doubt. Therefore, the conviction cannot be allowed to stand.

There is one other issue raised by defendant which we feel compelled to address before this case is retried. The defendant asserts that he cannot be tried and convicted for both felony murder and the underlying felony, in this case, robbery. To do so, defendant contends, is a violation of the double jeopardy clause of the fifth amendment.

There can be no doubt that the murder conviction obtained against defendant was based solely upon the theory of felony murder. This is clear from both the evidence presented and the trial justice's instructions to the jury.[3]

The defendant contends that his double jeopardy argument ought to be upheld in light of the United States Supreme Court decision of *Harris* v. *Oklahoma*, 433 U.S. 682, 97 S. Ct. 2912, 53 L. Ed. 2d 1054 (1977).

The *Harris* decision involved a defendant who was first tried and convicted for felony murder, and then tried and convicted for committing the underlying felony, robbery with firearms. The Court, in a very brief decision, held:

> "Where, as here, conviction for a greater crime, murder, cannot be had without conviction for the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction for the greater one * * *. [A] person [who] has been tried and convicted for a crime which has various incidents included in it * * * cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense." *Id.* at , 97 S. Ct. at 2912-13, 53 L. Ed. 2d at 1056.

[3] The relevant portion of the trial justice's instruction on murder was presented as follows:

> "Finally, the charge of murder. Murder is: One, an unlawful killing; Two, of a human being; Three, with malice aforethought, but our law provides an alternative to that third one in this situation. Our law provides that any murder committed during the commission of certain crimes—one of them being a robbery—is murder in the first degree. We refer to that sometimes as felony murder. The elements then in this case would be the unlawful killing of a human being while in the commission of a felony, one of the listed felonies, which is robbery."

The state argues that the holding of *Harris* is restricted to instances in which a defendant is subjected to successive prosecutions, not to cases such as the one at bar in which a defendant is convicted of both crimes at the same trial. We cannot agree with the state's argument.

It is our opinion that the question of double jeopardy cannot depend solely on whether a defendant is tried once or twice for two crimes which arguably constitute the same offense. "The Fifth Amendment guarantee against double jeopardy prohibits both successive prosecutions for the same offense as well as multiple punishment for the same offense." *Newton* v. *State*, Md. , 373 A.2d 262, 264 (1977). The record makes clear that defendant was punished for both the murder and the underlying felony. Although he received concurrent sentences for the two offenses, he has been punished twice. *Id.* at , 373 A.2d at 265; *People* v. *Martin*, 398 Mich. 303, 310, 247 N.W.2d 303, 306 (1976). Therefore, if these crimes constitute the same offense, defendant has been placed in jeopardy twice for one illegal act, despite the fact that he had but one trial. *State* v. *Boudreau*, 113 R.I. 497, 322 A.2d 626 (1974).[4] *See also People* v. *Anderson*, 62 Mich. App. 475, 233 N.W.2d 620 (1975).

[4] In *State* v. *Boudreau*, 113 R.I. 497, 322 A.2d 626 (1974), we found a violation of the double jeopardy clause when a defendant was convicted of both assault with a dangerous weapon and the commission of a crime of violence while armed with a pistol. Both convictions occurred at one criminal proceeding.

The rule followed in this state is the required evidence test adopted by the United States Supreme Court and stated in *Blockburger* v. *United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306, 309 (1932):

> "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."

We have consistently followed this rule. *State* v. *Grullon*, R.I. , 371 A.2d 265, 267-68 (1977); *State* v. *Boudreau*, *supra* at 503, 322 A.2d at 629; *State ex rel. Scott* v. *Berberian*, 109 R.I. 309, 316, 284 A.2d 590, 594 (1971).

The two offenses for which defendant was convicted were robbery, in violation of G.L. 1956 (1969 Reenactment) § 11-39-1 and murder, in violation of G.L. 1956 (1969 Reenactment) § 11-23-1.

The statutory crime of robbery incorporates all of the elements of the crime of robbery as it existed at common law. These elements are the felonious taking of money or other property of any value from the person of another, or in his presence, against his will, by force or fear of force. *State* v. *Domanski*, 57 R.I. 500, 190 A. 854 (1937).

Murder is statutorily defined in § 11-23-1 as "[t]he unlawful killing of a human being with malice aforethought." Murder in the first degree is:

> "[M]urder perpetrated by poison, lying in wait, or any other kind of wilful, deliberate, malicious and premeditated killing, or committed in the perpetration of, or attempt to perpetrate any arson, rape, burglary or robbery,

> or while resisting arrest by, or under arrest of, any state trooper or policeman in the performance of his duty; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed * * *."

As the trial justice charged, the elements of the murder conviction obtained against defendant were the unlawful killing of a human being while in the commission of the felony of robbery.[5]

The law is clear in cases of felony murder. In order to obtain a conviction, the state must prove all of the elements of the underlying felony, in addition to the other elements of murder, beyond a reasonable doubt. *Newton* v. *State*, *supra* at , 373 A. 2d at 266-67. The only element which distinguishes these two offenses is the proof of the victim's death.

> "The evidence required to secure a first degree murder conviction is, absent the proof of death, the same evidence required to establish the underlying felony. Therefore, as only one offense requires proof of a fact which the other does not, under the required evidence test the underlying felony and the murder merge." *Id.* at , 373 A. 2d at 267.

The *Newton* decision is quite similar to the case at bar and provides a most insightful discussion on the issue of double

---

[5] See note 3, *supra*. Although we have no doubt that defendant was convicted of murder under a felony murder theory, we need only be unable to say with certainty that the jury did not find defendant guilty of murder under that theory to reach the result we do today. *See People* v. *Anderson*, 62 Mich. App. 475, 482, 233 N.W. 2d 620, 623-24 (1975).

jeopardy. The defendant Newton was convicted of felony murder and attempted robbery, which provided the underlying felony for the murder conviction. Newton was found guilty of both charges at one trial and was given concurrent sentences of life imprisonment on the murder conviction and 20 years for attempted robbery. Newton appealed, and the Maryland Court of Appeals held that the separate convictions and sentences for the two offenses constituted double punishment for the same offense in violation of the double jeopardy clause of the fifth amendment.

The one factor which distinguishes *Newton* from the case at bar is the Maryland Criminal Code, which separates the various methods by which a first-degree murder conviction can be obtained into different statutory sections. Md. Ann. Code, art 27, §§ 407-410. In this state, murder in the first degree is embodied *in toto* in § 11-23-1.

This difference gives rise to the state's contention that the present case does not fall within the parameters of the required evidence test as outlined by this court. The state argues that it need not prove the elements of a felony under § 11-23-1 but may show, *inter alia*, the more common element of premeditated deliberation. Therefore, it argues, there are separate elements in the crimes of robbery and first-degree murder which are not included in the other offense.

We cannot accept the proposition that an individual's double jeopardy protection hinges on a legislative decision to codify the crime of first-degree murder either into one or several statutory sections. To do so would be, in effect, to allow a crucial constitutional protection to rest on legislative whim.

We note that the Supreme Court decision in *Harris* v. *Oklahoma*, *supra*, upon which defendant primarily rests his argument, was predicated on a statutory scheme such as our own, wherein the several acts which constitute murder in the first

degree were embodied in one statute. *See* Okla. Stat. Ann., tit. 21, § 701 (West).[6]

The case of *People* v. *Anderson*, *supra*, is also on point. In *Anderson*, the defendant was found guilty of both first-degree murder and armed robbery. The murder occurred in the course of the robbery, but whether the jury reached its verdict on a felony murder theory or found premeditated deliberation was unclear. Because of the inability to say that the verdict was not reached on a felony murder theory, the court held that the double jeopardy clause had been violated and ordered the armed robbery conviction dismissed. In construing the Michigan first-degree murder statute, Mich. Stat. Ann. § 28.548, which is similar to our own, the court stated:

> "[I]f the jury's first-degree murder conviction was based on a finding that the killing took place during the perpetration of the armed robbery, then the armed robbery constitutes a necessary element of first-degree (felony) murder. As a necessary element of first-degree murder, armed robbery would then become an included offense in the greater charge." *Id.* at 482, 233 N.W. 2d at 623-24.

We therefore hold that defendant may not be convicted of both murder in the first degree under a felony murder theory and the underlying felony of robbery. Upon retrial, if defendant is convicted on the murder count under a felony murder theory, he may not be separately convicted and punished for the underlying robbery.[7] If, however, he is convicted of

---

[6] This statute has since been repealed and replaced by Okla. Stat. Ann., tit. 21, § 701.7 (West), which still retains both forms of murder in the first degree.

[7] It is incumbent upon a trial justice to determine the basis for a jury's verdict of guilty on a murder count when a felony murder theory has been ad-

murder under another theory provided in § 11-23-1, or is acquitted of first-degree murder, he may be convicted of the robbery if the evidence presented so warrants.

Because of the decision we reach on the issues discussed, we do not reach the other assignments of error brought by the defendant.

The defendant's appeal is sustained, the judgments of conviction are vacated, the case is remanded to the Superior Court for a new trial.

Mr. Justice Paolino participated in the decision but retired prior to its announcement.

Mr. Justice Kelleher, with whom Mr. Justice Joslin joins, dissenting. The majority's opinion grafts a unique and heretofore judicially unrecognized addition to the four warnings required by *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); the fifth warning would read that the police, while in the company of a suspect who has been given his *Miranda* rights, shall remain silent at all times even among themselves; otherwise what they say to each other may be used to reverse a criminal conviction. I cannot subscribe to the view that the Federal Constitution now requires the police,

---

vanced at trial. The trial justice should instruct the jury that it must indicate by its verdict whether it has found the defendant guilty under the felony murder theory or whether it has found that the murder was committed "by poison, lying in wait, or any other kind of wilful, deliberate, malicious and premeditated killing" as provided in § 11-23-1. The trial justice must also instruct the jury that, regardless of its basis for finding the defendant guilty of murder in the first degree, it must also render a verdict on each of the other counts contained in the indictment. When the murder conviction is based upon a felony murder theory, the underlying felony must be merged into the murder. No conviction for the underlying felony may appear on the record, and no punishment may be imposed. *See Frye* v. *State*, Md. App. , 378 A.2d 155, 157 (1977).

upon arresting a suspect, to assume the role of contemplative monks at all times while they are in the suspect's company.

Before considering the constitutional issues, I would briefly detail the events that preceded the defendant's arrest. Shortly after the beginning of 1975, defendant, in the presence of his former girl friend, sawed off the ends of a shotgun. On the evening of January 12, 1975, he wrapped the shotgun in a blue and white blanket, went to the adjoining apartment, and asked the owner of the building to call a cab for him. When the first cab never arrived, a second was called. The dispatcher of the Silver Top Cab Company sent cab 21, with John Mulvaney driving, to pick up defendant. The owner of the apartment building watched as defendant entered the cab while carrying the blue and white blanket. Mr. Mulvaney radioed the dispatcher that he was going to East Greenwich with his fare and was never heard from again.

Cab 21 was discovered in a wooded area of Coventry a few days later. A blue and white blanket was found 200 yards from the cab. Approximately 800 yards from the cab the nude body of John Mulvaney was discovered in a shallow grave. The cause of death was a shotgun blast to the head fired at close range.

A few hours after his cab ride, defendant knocked on the door of a Coventry resident and asked for directions to Weaver Hill Road. The defendant also asked that a cab be called for him. The resident explained that no cabs would be running at that late hour. He noticed that defendant was traveling on foot and was carrying a red flashlight similar to one owned by the deceased.

At about 4 a.m. January 13, 1975, defendant arrived at the home of a friend on Weaver Hill Road, Coventry. The defendant said his car had broken down on Route 95 and asked to spend the rest of the night there. In the morning defendant showed his friend the sawed-off shotgun. He also asked his

friend to destroy the red flashlight. After a futile search for defendant's car which supposedly had broken down somewhere on Route 95, the friend gave defendant a ride to Providence.

After the friend had identified State's Exhibit 41 as the shotgun defendant had with him in the early morning of January 13, defense counsel then requested a voir dire "to determine whether or not this shotgun should be suppressed because of the fact that it was an illegal search, or a search without the consent of Mr. Innis, or even the possibility of an illegal arrest." Accordingly, the jury was excused, and an extensive voir dire was commenced regarding the circumstances under which the shotgun was discovered or seized.

The first witness called was Providence Patrolman Robert M. Lovell, who testified that in the early morning hours of January 17, 1975, he was searching the Mt. Pleasant area of Providence for the robber of a cab driver. At this point it should be noted why the Providence police were searching for defendant in the Smith Hill-Mt. Pleasant area. Shortly before midnight on January 16 the Providence police had been notified by a cab driver that he had just been robbed by a man wielding a sawed-off shotgun.[1] The cab driver had told the police that he originally picked up his gun-toting fare, later identified as defendant, in the city of Woonsocket and dropped him off in Providence, somewhere in the area of Rhode Island College. The police immediately began searching the general area for defendant. At approximately 4:30 a.m. Patrolman Lovell spotted defendant on Chalkstone Avenue and placed him under arrest.

In accordance with *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), Patrolman Lovell immediately informed defendant of his constitutional rights. Within minutes other officers involved in the search for defendant arrived at the scene of the arrest. Sergeant Francis J. Sears was the first to arrive. He also informed defendant of his constitutional rights. Captain John Leyden next arrived, and he also advised defendant of his rights. More specifically, he notified defendant that he had the right to remain silent, that anything he said could be used against him in a court of law, that he had the right to an attorney, and finally that if he could not afford a lawyer, one would be appointed for him by the State of Rhode Island. He asked defendant if he understood the rights, and defendant responded in the affirmative. The defendant then said he wanted to see an attorney. In full compliance with the dictates of *Miranda*, Captain Leyden then ceased all interrogation and ordered three subordinates to place defendant in a police car and transport him to police headquarters. Captain Leyden told the three officers that they were not to question defendant in any way.

Although there is some dispute about the seating arrangement, it would appear that Patrolman Richard McKenna and Joseph Gleckman occupied the car's front seat, while Patrolman Walter Williams and defendant were back-seat passengers. A wire screen which ran from the top of the back cushion of the front seat to the car's roof separated the front and back portions of the car. As the police car proceeded along Chalkstone Avenue toward Manton Avenue, Officer Gleckman began talking to Officer McKenna. The back-seat passengers could hear their conversation. Officer Gleckman described the conversation as follows:

> "At this point, I was talking back and forth with Patrolman McKenna stating that I frequent this area while on patrol and there's a lot of handicapped children running around in this area, and God forbid one of them

[1] The cab driver's testimony was excluded from the jury as prejudicial "other crimes" evidence.

might find a weapon with shells and they might hurt themselves.

"Q. Who were you talking to?

"A. Patrolman McKenna.

"Q. Did you say anything to the suspect Innis?

"A. No, I didn't."

At this point defendant spoke up from the back seat and said: "Turn around, I'll show you where the weapon is." Patrolman McKenna then radioed Captain Leyden and informed him they were returning to the scene of the arrest to locate the weapon. Having traveled less than a mile, they returned to the arrest scene in a matter of minutes.

When defendant alighted from the police car, Captain Leyden once again advised defendant of his rights. He asked defendant if he understood these rights, and defendant said he did, but he wanted to get the gun out of the way because of the "kids in the area" of the school. The police moved from Chalkstone Avenue to the Pleasant View School. There, with the aid of the headlights of various police vehicles, defendant went out into a nearby field and located the shotgun and some shells under a pile of rocks.

Today a majority of this court has seen fit to vacate the conviction under review on the ground that the admission of the shotgun violated defendant's constitutional right against self-incrimination. I cannot agree.

The majority rests its conclusion on the recent Supreme Court decision in *Brewer* v. *Williams*, 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977).[2] *Brewer* consists of a majority

[2] *Brewer* was decided on sixth amendment grounds (right to counsel). The majority has chosen to rely upon the fifth amendment in reaching today's result, despite the explicit refusal by the Supreme Court to decide *Brewer* under the fifth amendment. *Brewer* v. *Williams*, 430 U.S. 387, 397, 97 S. Ct. 1232, 1239, 51 L. Ed. 2d 424, 435-36 (1977).

opinion and three concurring opinions, all of which are carefully worded and narrowly drawn. I believe that if the Supreme Court had before it the facts that were elicited at the trial in the Superior Court, *Brewer* would be considered inapposite.

In *Brewer* the accused, Williams, surrendered to the police in Davenport, Iowa, upon the advice of a Des Moines attorney. A warrant had been issued for Williams' arrest in connection with the Des Moines abduction of a 10-year-old girl. Williams' attorney was present at the Des Moines police station when the Davenport police called with the information that Williams had surrendered. In the presence of certain Des Moines police, the attorney talked to Williams on the phone and informed him that Des Moines police would be driving to Davenport to pick him up, that they would not interrogate him, and that Williams should not talk to the police regarding the abduction.

Williams was arraigned in Davenport on the Des Moines warrant and advised of his *Miranda* rights. He was represented then by a second attorney, who advised him not to make any statements to the police until he consulted with his Des Moines counsel. When the Des Moines police contingent arrived in Davenport to transport Williams, they refused to allow the Davenport attorney to accompany his client on the return trip. One of the police contingent was a detective who held the rank of captain. He was present when the Des Moines attorney had advised Williams to remain silent and assured his client that he would not be interrogated on the trip to Des Moines. When the detective expressed some reservations about the no-interrogation arrangements, Williams' Davenport attorney made it clear to the detective that Williams was not to be questioned on the way back to Des Moines.

Soon after the Des Moines police set out on the 160-mile return trip to headquarters, the detective engaged his prisoner

in a "wide ranging conversation." 430 U.S. at 392, 97 S. Ct. at 1236, 51 L. Ed. 2d at 432. Unlike the situation in the case presented to us, the detective specifically addressed his remarks to the prisoner. Knowing that the prisoner was a former mental patient and a man of strong religious conviction, the detective delivered what is generally referred to as the "Christian burial speech." *Id.* Addressing the prisoner as "Reverend," the detective said:

> "'I want to give you something to think about while we're traveling down the road. . . . Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all.'" 430 U.S. at 392-93, 97 S. Ct. at 1236, 51 L. Ed. 2d at 432-33.

Not far from Des Moines the prisoner directed the police to the body of the young girl.

The evidence in question was admitted at Williams' subsequent murder trial, and the jury returned a verdict of guilty. Mr. Justice Stewart, in speaking for the majority, relied heavily on *Massiah* v. *United States*, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964), and ruled that Williams had been denied the right to the assistance of counsel. A careful reading of the majority opinion reveals that the key factor underlying this conclusion was the detective's admission that his "Christian burial speech" was made "with the specific intent to elicit incriminating statements." 430 U.S. at 403, 97 S. Ct. at 1241, 51 L. Ed. 2d at 439. Justice Stewart continually stressed that the detective deliberately and designedly set out to elicit information from the prisoner. 430 U.S. at 399, 403, 405, 97 S. Ct. at 1239, 1240, 1241, 1243, 51 L. Ed. 2d at 436, 437, 439, 440. Justices Powell and Marshall, in separate concurring opinions, also stressed the intentional nature of the police conduct. 430 U.S. at 408, 412, 97 S. Ct. at 1244, 1246, 51 L. Ed. 2d at 442, 445.

In contrast, there is nothing in the record before us which suggests in any way that Patrolman Gleckman deliberately set out to elicit incriminating statements from defendant. All the evidence in the record is directly to the contrary.[3] All of the officers testified that Captain Leyden had specifically ordered them not to question defendant. All agree that after defendant requested an attorney, no one spoke to him, questioned him, or directed their remarks to him in any way. Statements volunteered by a suspect have never been thought to create constitutional problems. *Miranda* v. *Arizona*, 384 U.S. at 478, 86 S. Ct. at 1630, 16 L. Ed. 2d at 726; *State* v. *Travis*, 116

[3]The defendant did not testify or introduce any evidence during the voir dire regarding the shotgun. Therefore, the only evidence in the record is the uncontradicted testimony of all the police officers who were present when the defendant was arrested and transported to the police station.

R.I. 678, 360 A. 2d 548 (1976). Only the "interrogation" of a suspect after he has asserted his rights or requested an attorney is constitutionally impermissible. *Id.* While the dividing line between the two may not always be clear, when the record adduced in the Superior Court is measured against the criterion set forth in *Brewer* concerning whether the police have deliberately and designedly set out to elicit information from the suspect, it is clear that defendant was not being interrogated when he overheard Gleckman's conversation.

At the time of defendant's arrest in January 1975, Patrolman Gleckman had been a member of the Providence Police Department for just over a year. He could not have heard about the Iowa captain's impassioned exhortation because *Brewer* was not published until some 2 years later, in March 1977. Once defendant expressed his choice of consulting with an attorney, Officer Gleckman's sole duty was to assist in the transportation of the prisoner from Mt. Pleasant's Chalkstone Avenue to police headquarters in downtown Providence. In the vernacular, Officer Gleckman was a "street cop." His beat often included the Pleasant View School area. There is no question that Pleasant View is a city school which serves the needs of the retarded or emotionally disturbed child. There is no comparison between the Iowa detective's intentional playing upon the emotions of a prisoner and Patrolman Gleckman's off-hand reference to patrolman McKenna about Pleasant View's student body.

Even if I were to concede that defendant was "interrogated," I would not exclude the shotgun from evidence for, in my opinion, defendant voluntarily and intelligently waived his privilege against self-incrimination when he decided to lead the police to the shotgun. At this waiver stage the instant case loses any and all resemblance to the facts of *Brewer* v. *Williams*. In *Brewer* there was no "break in the action" after the subtle interrogation had commenced before Williams led

the police to the body. As Justice Powell noted, there was no evidence that the defendant voluntarily waived his rights, except the fact that statements eventually were obtained. 430 U.S. at 411, 97 S. Ct. at 1246, 51 L. Ed. 2d at 444, Powell, J., concurring.

The officer in charge of the early morning search for the individual who had held up the cab driver was Captain Leyden. He, along with a dozen other officers, had been searching for defendant since midnight because the cab driver, upon being brought to police headquarters, saw defendant's picture on a "Wanted" poster and immediately identified him as his assailant.

When defendant was arrested unarmed at 4:30 a.m., the logical inference was that he had secreted the shotgun nearby. The defendant was arrested about a block away from the Pleasant View School, and within a matter of a few hours the children would be making their way towards this institution. When defendant requested an attorney, all questioning ceased. And now defendant had returned to the scene and indicated a willingness to pinpoint the location of the dangerous weapon. Under the circumstances, what should Captain Leyden have done? I submit he did the only thing he reasonably could have done. The defendant was taken out of the police car and for the fourth time that evening was given the full panoply of constitutional protection due him. The captain then asked defendant if he understood these rights and received an affirmative answer. When defendant insisted on locating the shotgun, Captain Leyden directed that the search for the weapon begin. I would hold that the state has met its heavy burden of establishing that defendant voluntarily, knowingly, and intentionally relinquished his known rights. *See Johnson* v. *Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938); *State* v. *Vargus*, R.I. , 373 A. 2d 150 (1977).

The views expressed by the majority come perilously close to fulfilling the worst fears of the four *Brewer* dissenters, who expressed concern that the majority in *Brewer* was really holding that once a suspect has asserted his right not to talk without the presence of an attorney, "it becomes legally impossible for him to waive that right until he has seen an attorney." 430 U.S. at 418-19, 97 S. Ct. at 1249, 51 L. Ed. 2d at 449, Burger, C.J., dissenting. In fact, Justice Stewart took pains to deny this charge specifically and suggested that a valid waiver could have been found had the Des Moines detective prefaced his remarks by telling Williams that he had a right to the presence of a lawyer or otherwise made an effort to ascertain whether Williams wished to relinquish that right. 430 U.S. at 405-06, 97 S. Ct. at 1243, 51 L. Ed. 2d at 440-41. That, I suggest, is precisely what Captain Leyden did here. Justice Powell's concurring opinion is more emphatic on this point. He found "no justification" for the views of the Chief Justice:

> "On the contrary, the opinion of the Court is explicitly clear that the right to assistance of counsel may be waived, after it has attached, without notice to or consultation with counsel." 430 U.S. at 413, 97 S. Ct. at 1246, 51 L. Ed. 2d at 445.

Despite these explicit assurances found in *Brewer*, the majority finds no waiver following Captain Leyden's second rendition of the *Miranda* warnings. The rationale for this failure is based upon a somewhat novel interpretation of the "fruit of the poisonous tree" doctrine. In discussing the "fruit of the poisonous tree" concept, the United States Supreme Court has specifically limited the extent to which prior illegal police conduct must be considered responsible for the securing of incriminatory information.

> "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" *Wong Sun* v. *United States*, 371 U.S. 471, 487-88, 83 S. Ct. 407, 417, 9 L. Ed. 2d 441, 455 (1963); *Commonwealth* v. *Cunningham*, 471 Pa. 577, 586, 370 A.2d 1172, 1176-77 (1977).

Even assuming Officer Gleckman's concern about the Pleasant View student population was in fact an artfully executed interrogation, I believe the police did not "exploit" the primary illegality, but instead "purged" the primary taint by taking the defendant out of the police car, placing him on the street, reading him for the fourth time his *Miranda* rights, and making sure he understood the consequences of his action. In response the defendant told Captain Leyden that he did understand what he was doing and then went out into the nearby field and located his weapon for the police. If this factual pattern does not constitute a valid waiver of one's fifth amendment rights, the worst fears of the *Brewer* dissenters have now been realized.

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

KENT, Sc. SUPERIOR COURT
No. 75-333-C.A.

STATE OF RHODE ISLAND

vs IND. No. 75-8

THOMAS J. INNIS

HEARD BEFORE MR. JUSTICE SHEA

AND A JURY 31 OCTOBER 1975
3 NOVEMBER 1975
4 NOVEMBER 1975
5 NOVEMBER 1975
6 NOVEMBER 1975
7 NOVEMBER 1975
10 NOVEMBER 1975
11 NOVEMBER 1975
12 NOVEMBER 1975
25 NOVEMBER 1975

Motion for New Trial and Sentencing

Appearances:

For the State ..... Walter Stone
For the Defendant ..... Benedetto Cerilli

* * * * * * * * *

[15] MR. CERILLI: Your Honor, I'd also make a motion for an individual voir dire of the jury panel based on the fact that this particular case has received a considerable amount of publicity in the Kent County area, and in addition, Mr. Innis himself has been the subject — or at least his name has been mentioned in an article in the Providence Journal, front page, in just the Summer of '75.

THE COURT: I certainly think that is a reasonable request in view of the offense charged. The defendant's motion for an individual voir dire is granted.

MR. STONE: I have no objection.

MR. CERILLI: Your Honor, I'd also make a motion to sequester the witnesses.

THE COURT: The motion will be granted. Any further motions to be handled today?

MR. CERILLI: Your Honor, there is another motion which we have discussed in chambers but I will put on the record at this point, the motion to suppress the introduction of a sawed-off shotgun, and it is my understanding that that motion will be heard during the course of the trial with a voir dire.

[16] THE COURT: Is there any objection to proceeding in that way?

MR. STONE: No objection on the part of the State.

THE COURT: Do you anticipate that this motion for suppression would be a very extensive one? I am wondering about interrupting the trial proceedings. The fact is that if we took it beforehand, we may well be repeating a great deal of testimony. While normally they are heard before trial, I have no objection to hearing it at the time the situation arises.

MR. STONE: This doesn't involve a confession as such, only the possession related to the whereabouts of the shotgun.

THE COURT: It involves the Fourth Amendment Rights?

MR. STONE: And I don't expect there will be a lot of witnesses on the part of the State.

MR. CERILLI: I don't expect to produce any witnesses, your Honor, at this point.

THE COURT: All right. If there is no objection from either side, we will handle it that way when the situation arises during the trial.

* * * * * * * * *

[376] MR. STONE: Would you like Mr. Aubin now or —

THE COURT: No. There are two matters and we will take one at a time.

MR. CERILLI: If your Honor please, may I have a moment to confer with my client?

THE COURT: Yes, you may.

MR. CERILLI: Your Honor, if the Court please, I have discussed with Mr. Innis the possibility of taking the stand. I have explained to him that for the purposes of this hearing, he could take the stand and in fact it would not go before the jury.

THE COURT: That is correct.

MR. CERILLI: However, at this time, after discussing the pros and cons with Mr. Innis, Mr. Innis wishes not to take the stand.

THE COURT: Very well.

MR. CERILLI: And which is his right under our constitution.

THE COURT: Absolutely.

MR. CERILLI: So, that the defense will not present any witnesses at this particular time.

THE COURT: All right. Does the State rest [377] with regard to this particular voir dire, Mr. Stone?

MR. STONE: Yes, your Honor.

THE COURT: And the defense rests?

MR. CERILLI: Yes, your Honor.

THE COURT: I will hear argument.

(Argument presented by counsel)

THE COURT: It is clear from the evidence that the evidence presented contained some discrepancies as to who sat where in the automobile; those discrepancies are not at all vital or disturbing to the Court. The real issue is, did this defendant have the benefit of his Miranda Warnings at the time he was apprehended, at the time he was placed in the car for transport to the police station, and at the time he returned apparently volunteering to locate the weapon.

The Court is completely satisfied after hearing the police witnesses testify that this defendant was repeatedly and completely advised of his Miranda rights. It is entirely understandable that a police officer not used to testifying, could forget one of the phrases of the warnings when testifying. When questioned, it came back to mind.

I would point out parenthetically that it is quite obvious to the Court that these witnesses who testified this morning were not rehearsed nor did they get together and [378] compare notes before testifying. They have disagreed with each other on unimportant particulars. That evidence impresses me as to its credibility. I must note that.

When the request for counsel was made, first time, second time, possibly third time, because there was the original officers and then Leyden: "I want an attorney", the proper thing happened. The defendant was placed in the car and ordered transported to headquarters.

In the automobile, driving along Chalkstone Avenue, we have three officers who are out at four in the morning, or later, and have been prowling around searching for a weapon which they had reason to believe was there. The weapon was either loaded or with shells. It is in the area of a school where when daylight arrives handicapped and retarded children will be coming to the area. I think it is entirely understandable

that they would voice their concern to each other. And I have to say that I commend the defendant for responding to the danger which, more than likely, he did not know of up until that time. There is no reason for me to believe, and no evidence on which I should conclude, that he was familiar with the area and the type of facilities that were there. So the defendant responded out of a very commendable concern to a situation [379] that he became acquainted with. I commend him for it. He responded and then said: "Turn around, take me back and I will show you where the weapon is."

It was a waiver, clearly, and on the basis of the evidence that I have heard, an intelligent waiver, of his right to remain silent. And for whatever reason, whatever motivates people, as long as it is not the result of threat or coercion, it is a waiver for all purposes, and the weapon was found.

I find that the seizure of this weapon by the authorities, on the basis of the evidence that I have heard and that I believe, and the inferences that I draw from it, in no way violated the defendant's constitutional rights.

The defendant's oral motion to suppress this weapon that has been marked as State's 41, is denied. The defendant's exception is noted.

MR. STONE: Is the Court ready for Mr. Aubin?

THE COURT: Yes. I would also state for the record, the Court distinguishes the Massey case in that the situation there was entirely different. The counsel had requested by name, had responded by telephone, had spoken both to the defendant and to the police, and I [380] found in that case that a waiver had to be in the presence of counsel because that counsel had all but entered an appearance in the case. The case of Poeple against Arthur, I also distinguish, because in that case counsel had appeared; not just a call for counsel. So that I distinguish both of those cases.

* * * * * * * * *

APPENDIX.

In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-1076.

STATE OF RHODE ISLAND,
PETITIONER,

v.

THOMAS J. INNIS,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND.

Petition for Certiorari filed January 5, 1979.
Certiorari granted February 26, 1979.

Table of Contents.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. SUPERIOR COURT
No. 75-333-C.A.

STATE OF RHODE ISLAND

vs. IND. NO. 75-8

THOMAS J. INNIS

Chronological List of Relevant Docket Entries.

1975	
March	
20	Indictment returned.
October	
31	Trial begins in the Superior Court for Kent County.
November	
3	Trial continues.
4	Trial continues.
5	Trial continues.
6	Trial continues.
7	Trial continues; defendant's oral motion to suppress heard.
10	Trial continues; voir dire on defendant's motion to suppress is concluded; motion to suppress is denied; voir dire on State's motion to allow testimony of Mr. Aubin; motion denied.

1975	
November	
11	Trial continues.
12	Trial continues; jury charged and retires to deliberate; jury returns verdict of guilty as charged.
13	Motion for new trial filed.
25	Motion for new trial denied; defendant sentenced to serve twenty (20) years on Count 1, thirty (30) years on Count 3, and to life imprisonment on Count 5.
December	
2	Notice of appeal to the Rhode Island Supreme Court filed.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS.

KENT, SC. SUPERIOR COURT
No. 75-333-C.A.

STATE OF RHODE ISLAND

vs. IND. No. 75-8

THOMAS J. INNIS

HEARD BEFORE MR. JUSTICE SHEA AND A JURY

31 October 1975
3 November 1975
4 November 1975
5 November 1975
6 November 1975
7 November 1975
10 November 1975
11 November 1975
12 November 1975
25 November 1975

Motion for New Trial and Sentencing.

Appearances:

For the State ..... Walter Stone
For the Defendant ..... Benedetto Cerilli

• • • • • • • • • •

[15] MR. CERILLI: Your Honor, I'd also make a motion for an individual voir dire of the jury panel based on the fact

that this particular case has received a considerable amount of publicity in the Kent County area, and in addition, Mr. Innis himself has been the subject — or at least his name has been mentioned in an article in the Providence Journal, front page, in just the Summer of '75.

THE COURT: I certainly think that is a reasonable request in view of the offense charged. The defendant's motion for an individual voir dire is granted.

MR. STONE: I have no objection.

MR. CERILLI: Your Honor, I'd also make a motion to sequester the witnesses.

THE COURT: The motion will be granted. Any further motions to be handled today?

MR. CERILLI: Your Honor, there is another motion which we have discussed in chambers but I will put on the record at this point, the motion to suppress the introduction of a sawed-off shotgun, and it is my understanding that that motion will be heard during the course of the trial with a voir dire.

[16] THE COURT: Is there any objection to proceeding in that way?

MR. STONE: No objection on the part of the State.

THE COURT: Do you anticipate that this motion for suppression would be a very extensive one? I am wondering about interrupting the trial proceedings. The fact is that if we took it beforehand, we may well be repeating a great deal of testimony. While normally they are heard before trial, I have no objection to hearing it at the time the situation arises.

MR. STONE: This doesn't involve a confession as such, only the possession related to the whereabouts of the shotgun.

THE COURT: It involves the Fourth Amendment Rights?

MR. STONE: And I don't expect there will be a lot of witnesses on the part of the State.

MR. CERILLI: I don't expect to produce any witnesses, your Honor, at this point.

THE COURT: All right. If there is no objection from either side, we will handle it that way when the situation arises during the trial.

[17] MR. CERILLI: All right. Your Honor, may we approach the bench for a moment?

(Bench conference)

THE COURT: This is an unusual request and I am not sure this Court has any authority to order those authorities who are responsible for Mr. Innis' custody to allow him to make this trip. I am inclined, however, to see if I cannot in some way get their cooperation and allow Mr. Innis and his attorney to — under whatever limitations or conditions the committing squad or the prison authorities make — to examine the area of Chalkstone Avenue in Providence, and see if he can locate this house that Mr. Innis feels may be important to his defense. Now, we have a weekend coming up, and because of so many considerations, the Court will attempt to cooperate, Mr. Innis, but I would tell you that I do not want any prior publicity or notice to the fact that I have agreed with this request. I am doing it because I feel it is important to you. I am not creating a policy for the Court to follow, if you know what I mean. I will speak personally with the committing squad people. I will speak with them as soon as we have concluded, and it would be done at their convenience and under . . .

* * * * * * * * *

[65] Q And what in particular, if anything, were you searching for?

A A body.

Q And in fact were you successful in that search?

A Yes, I was.

Q And did you recover a body?

A Yes, I did.

Q And where did you recover the body?

A Approximately traveling south on Weaver Hill Road from Harkney Hill Road, about a mile-and-a-half there is an access road. Approximately 300 yards down the access road and 800 yards into a wooded area, I found a shallow grave.

Q You found a shallow grave? You say a shallow grave. Court you describe what you first observed?

A Well, I'd been in the woods about an hour-and-a-half, two hours, and I came upon an area that had been — the leaves — an area say about ten, fifteen feet — the leaves had been disturbed.

Q The leaves had been disturbed. Now, showing you a photograph that I will ask to be marked as State's Exhibit 1 for Identification at this time.

THE COURT: State's 1 for Identification.

Q Showing you State's Exhibit 1 for Identification, as . . .

• • • • • • • • •

[86] the body of Mr. Mulvaney?

A Only on the hip area and the lower legs.

Q And would that lead you to conclude if a person had walked through heavy brush they would have had to be clothed?

A Certainly the upper portion of the body and the rest of the body had no abrasions and would therefore, if walking through a wooded area, would most likely be clothed or protected in some manner.

Q Some manner. And what conclusion did you reach based on your medical experience and education as to the cause of death of John Mulvaney?

A It is my opinion that the cause of death is the shotgun wound of the head.

Q Causing severe hemorrhaging?

A Causing extensive fractures and extensive destruction of brain tissue.

Q And do you have an opinion based on your experience and education as to the manner of death?

A Yes, I do.

Q And what is that opinion?

A Homicide.

Q Homicide? Thank you. I have no further questions.

• • • • • • • • •

[218] Q And what time, if you can recall, did he come on duty?

A He came on duty about 5:30 on a Sunday night.

Q Now, I show you State's Exhibit 16, it is a photograph of a cab, it says Silver Top on the top, it says Public, then 1263. I ask you if you can identify that vehicle?

A I can. It is a 1973 Chevrolet, Cab Number 21.

Q And whose cab is that?

A Belongs to me, sir.

Q And on January 12th, do you know who was driving Cab Number 21?

A John Mulvaney.

Q And did you have an occasion to dispatch that cab to 105-107 Comstock Avenue?

A I did. I dispatched that cab about, I'd say, 10:25 that evening.

Q And in the normal course of events, do you keep a log of the cabs you dispatch?

A We mark down the time that we give them the job.

Q And you say Cab 21 as identified in that photograph is the same cab that Mr. Mulvaney was driving?

A Yes, it is.

• • • • • • • • •

[266] A Ground hog, maybe.

Q Ground hog, maybe? Now, from your knowledge of what a shotgun normally looks like, would this one be easy to conceal?

A Yes, sir.

MR. STONE: I have no further questions.

MR. CERILLI: I have no further questions of this witness, your Honor, but I would argue again that in our prior discussions at pretrial, it was known the shotgun would be introduced at some time. It was discussed at that time should we have the voir dire or the constitutional issues before trial as normal procedure. We had decided then we'd wait until the introduction. That was my understanding and that's why a formal motion wasn't submitted at that time. Now, the shotgun comes in for identification. Now, once it's in for identification, no cautionary instruction the Court gives, if it is suppressed later on, it's not put in as a full exhibit, it is absolutely useless. Any cautionary instruction at that time would not cure the error. And I maintain again that before any further testimony on this particular shotgun, your Honor, is received by this jury, we should determine whether or not it was obtained in an illegal manner. [267] That's the whole question, not really the identification. How was it obtained? Was it obtained in an illegal manner? If it's obtained in an illegal manner, it should be suppressed.

(Bench conference)

THE COURT: With agreement of counsel, it appears that there are two voir dire hearings that are necessary, one on the admissibility of this State's 41, of which issue has been raised, and also the testimony of the certain witness proffered by the State whom I insist there be a voir dire before. We will interrupt Mr. Calder's testimony at this point. I will explain to the

jury that there are legal considerations that have to be taken care of and we will not waste their time with it. We will take two witnesses who are ready, who have nothing to do with physical evidence, and then excuse the jury for the weekend. This afternoon, we will devote to the voir dire hearing so that when we resume on Monday, we will be able to continue without interruption. Is that understood and agreeable, counsel?

MR. STONE: Yes. And could the Court instruct Mr. Calder that we haven't finished with his testimony, and will return Monday?

* * * * * * * * *

[299] appears in all fairness to you that we would be occupied most of the afternoon so for that reason we have interrupted the trial. We will excuse you. You can start your weekend early. The day is not a total loss, however. The Clerk of the Court has a very important paper for you, a small check with your name on it. Today is payday. If you will retire to the juryroom, I will have Mr. Mooty pay you off. Be in the juryroom Monday morning no later than ten minutes of ten. I repeat my instructions to you, have no conversations among yourselves about the case, do not allow anyone to discuss it in your presence, do you understand? Have a good weekend. You are excused.

(The Jury left the courtroom)

THE COURT: We will recess until 2 o'clock. This afternoon we will devote to a voir dire on the seizure of the weapon that has been marked for Identification, and also on Mr. Aubin.

MR. STONE: I am trying to get Mr. Aubin. We have the police coming in at two. It seems to be some problem with

Mr. Aubin. I am trying to make some arrangement to have him picked up. He works somewhere out of state.

[300] MR. GREEN: Massachusetts. General Electric. About a 45 minute ride. He is in a car pool and does not have transportation.

THE COURT: We may have to do this Monday but it would delay him. If you cannot get him this afternoon, we will do it on Monday. I will not allow the man to testify until I have heard a voir dire out of the hearing of the jury.

MR. CERILLI: Your Honor, if the Court please, if I may make a suggestion. If the man is from out of state, and if he is going to come in for a voir dire today, and the voir dire assuming — I don't believe it will be, but assuming that it is granted, Monday he'd have to come back again. I just point that out to the Court. If it is granted, he'd have to testify before the jury.

THE COURT: If he is on his way, let him come. If he is not, we may have to do it first thing Monday morning. But in fairness to the jury, if we knew that, I would not have the jury come in at 10 o'clock.

MR. STONE: I definitely have him scheduled here for Monday. I would say —

THE COURT: Yes do.

[301] MR. CERILLI: I wouldn't mind starting earlier Monday morning.

THE COURT: Be available at 9:30. We may have the voir dire before the jury is seated. Perhaps we could conclude it by then.

MR. CERILLI: I will be here at 9:30.

THE COURT: I still want your memoranda with regard to this.

MR. CERILLI: It should be here by two. Judge, may I approach the bench with Mr. Stone?

THE COURT: Yes.

(Bench conference)

AFTERNOON SESSION

(Defendant enters)

MR. STONE: Your Honor, at this time the State would call Patrolman Lovell to take the stand.

THE COURT: Very well.

MR. CERILLI: If your Honor pleases, I'd ask the other police officer to leave the courtroom if he is going to be a witness.

THE COURT: The witness is to be sequestered. Very well. Incidentally, although the witnesses have been sequestered during the trial, there was no motion [302] on the record for that, as I recall.

MR. CERILLI: I thought there was. I'd make a formal motion at this point.

THE COURT: Well, they have been sequestered, in any event.

ROBERT M. LOVELL SWORN

Direct Examination by Mr. Stone

Q Now, you're a Providence Policeman, Patrolman Lovell?

A Yes.

Q On January 17th, in the A.M., approximately 4:30 A.M., were you on duty?

A Yes, sir.

Q And can you recall what you were doing at that time?

A I was in the Mt. Pleasant area.

Q Why were you in the Mr. Pleasant area?

A I was searching for a subject that was wanted regards to a robbery of a cab driver.

Q Of a cab driver?

MR. CERILLI: Your Honor, I have no objection to that at this time, the only problem I have, your Honor — we can speak freely now with the jury not being here?

[303] THE COURT: Surely.

MR. CERILLI: — is that if this officer were to testify before the jury, I'd like to have some cautionary instruction or we should discuss it now, with the fact of bringing in any evidence as to this second cab robbery. But the way he's testified now, Judge, if he says a cab driver, a robbery of a cab driver, that's what we are on trial for, robbery of a cab driver, not the one from Woonsocket, so I would object, your Honor, for the record.

MR. STONE: Well, I think we have to look in light of the fact Monday morning we have Aubin coming in and I would assume that if his testimony is allowed to come in, then the jury will know about the other cab driver.

THE COURT: Well, that has not been decided.

MR. STONE: I know, your Honor.

MR. CERILLI: But I think perhaps this witness, if he does testify before the jury, should be cautioned that he could indicate that he was in the Mount Pleasant area on detail searching for a suspect.

THE COURT: It is much safer. We do not want to get anything before the jury that we'd be unable to [304] strike from the record effectively.

Q Were you successful in finding someone pursuant to your search?

A Yes, sir.

Q And who did you find?

A Thomas Innis.

Q Thomas Innis? Where did you locate him?

A On Chalkstone Avenue.

Q Do you see that same Thomas Innis in the courtroom today?

A Yes, sir.

Q Could you point to him, please?

A The subject sitting right there.

Q What does he have on?

A Denim jacket, brown pants, denim — brown shirt, excuse me, and denim pants.

MR. STONE: May the record reflect that the witness had indicated the defendant Thomas Innis?

THE COURT: The record may so reflect.

Q Was Mr. Innis placed under arrest?

A Yes, sir.

Q Did you advise him of his constitutional rights to remain silent?

MR. CERILLI: Objection, your Honor.

[305] A Yes, sir.

THE COURT: I beg your pardon?

MR. CERILLI: Objection. Leading.

MR. STONE: Your Honor, I would assume this is preliminary in the absence of the jury.

THE COURT: It is preliminary but I will not allow the leading questions, I warn you, Mr. Stone.

Q You said that you placed him under arrest?

A Yes, sir.

Q Now, what did you do when you placed him under arrest?

A I advised him of his constitutional rights.

Q And what happened next?

A Well, I searched him for weapons.

Q Did you find any weapons?

A No, sir.

Q And was anyone else at the scene at that time?

A At that time, no sir.

Q Did anyone else subsequent to that appear at the scene?
A Well, a short time later several policemen responded to the scene.
Q And do you know who any of them were?
A Sergeant Sears, Captain Leyden.
Q Now, was he advised of his rights again in your presence?
[306] A Yes, sir.
Q By whom?
A By Sergeant Sears.
Q By Sergeant Sears. And then what happened?
A Well, Captain Leyden arrived and he also advised him of his rights.
Q Still on Chalkstone Avenue?
A Yes, sir.
Q What happened then?
A Well, then we placed him in a caged car and had him transported to the station.
Q And what happened next?
A Well, the patrolman in the wagon came back on the air and they said that Thomas stated he had wanted to show them where the gun was, so they in turn brought him back to where we were.
Q Brought him back to you?
A Yes, sir.
Q What happened then?
A We went up in the area where Thomas showed us — he pointed out a certain spot under some rocks. He said the gun was there.
Q Was there any conversation with him?
[307] A At the time?
Q Yes.
A Well, he's just showing us where the gun was. He's looking through some rocks. He said: "I think I put it here."

Then, you know, it wasn't there. Then he went to another spot and then we found the gun.
Q And did he say why he wanted to show you where the gun was?
A Yes, sir. He said that he didn't want no kids up there to get hurt because it was right next to the Pleasant View School. It's a school for retarded.
Q And did you, subsequent to the return to the area, find a shotgun?
A Yes, sir.
Q And did you recover the shotgun?
A I did, yes.
Q Did you identify it?
A Yes.
Q How did you identify it?
A I marked it. I marked my initials on the gun.
Q Can you describe what that shotgun looked like?
A It's a bolt action .16 gauge shotgun, sawed-off.
Q Sawed-off? Showing you State's Exhibit 41 for [308] Identification, can you identify this shotgun?
A Yes, sir.
Q And how can you identify it?
A My initials are scratched here along with the date.
Q What are the initials on it?
A RML.
Q And what is your name?
A Robert Michael Lovell.
Q Lovell. What's the date that appears on it?
A 1/17/75.
Q And is it your testimony that you advised Mr. Innis of his rights?
A Yes, sir.
Q And that he voluntariiy directed you to this shotgun?

A Yes, sir.

MR. STONE: I have no further questions.

Cross-Examination by Mr. Cerilli

Q Where did you apprehend Mr. Innis?

A On Chalkstone Avenue, in front of 1630, I believe, Chalkstone Avenue.

Q What was he doing?

A What was he doing?

Q Yes.

[309] A Standing in the street.

Q In the street?

A Well, you know, right near the curb.

Q From which direction did you approach, from Providence or from Centerdale or Manton section?

A Johnston. I approached from the Providence side coming down the hill.

Q All right. You were coming down the hill. What side of the street was Mr. Innis on?

A The left side.

Q The opposite side of the street from where your car was?

A Yes, sir.

Q And he was standing on the street facing what direction?

A Towards the street.

Q Facing towards you?

A Yes, sir. That's why I saw him and stopped.

Q Did you stop the car?

A Yes.

Q As soon as you saw him?

A Yes (Nodding).

Q And he stood right there, did he not?

A Yes, sir.

[310] Q He walked right towards the car, did he not?

A I believe he did, sir.

Q He didn't run away at all?

A No, sir.

Q There was no fight at all?

A Not at that time.

MR. STONE: Objection.

THE COURT: Overruled. It is cross-examination, Mr. Stone. You will not be able to use that particular word in front of the jury tomorrow. That is a conclusion they will deliberate on. You may ask the question more carefully, though.

MR. CERILLI: Yes, your Honor.

THE COURT: I would observe that as this trial is going on, the precision with which questions have been asked and the respect for the regulations has lessened somewhat.

Q Now, what did he do when you stopped your car?

A Just stood still, sir.

Q And did you take him into custody?

A Yes, sir.

Q You handcuffed him?

A Yes, sir.

[311] Q Now, after you handcuffed him, what did you do?

A I advised him of his constitutional rights as I was handcuffing him, then I put him in the back seat of the car.

Q So, you advised him of his constitutional rights outside of the car?

A Yes, sir.

Q What did you say to him, exact words?

A Nothing really other than advise him of his constitutional rights and —

Q What were the words that you spoke to him?

A Oh, you mean his constitutional rights?

Q Yes.

A You have the right to remain silent; you have the right — you have the right to remain silent; anything you say can and will be used against you in a court of law; you have the right to have an attorney present when being questioned.

Q Is that all you said?

A Basically, that's it, yes, sir.

THE COURT: Did you recite them or did you read them from a card?

WITNESS: I recited them, Like I say, this [312] all happened very fast.

Q And is that the entire — is that all you said to him, to Thomas Innis, at that time?

A Yeah. Well, he — when I sat him down in the car, he asked me for a cigarette and I gave him one.

Q Is that the only thing he said to you?

A At that time, yes.

Q Now —

A Because right — well —

Q Pardon?

A No. I was going to say right then the sergeant arrived.

Q I understand. Now, this was all in front of 1630 Chalkstone Avenue?

A Right across the street, or right in front.

Q How long a period of time transpired before someone else arrived on the scene?

A Matter of a couple of minutes, if that.

Q All right. Who was the next person on the scene?

A Sergeant Sears.

Q And what did he do?

A He sat down in the back seat with Thomas and he advised him of his constitutional rights.

Q What did you hear him say?

[313] A Basically, what I said, you know.

Q Did he add anything other than what you had just said?

A I don't remember, sir.

Q You don't remember?

A No.

Q All right. Then what happened? What happened next?

A Well, the captain came up, captain pulled up right then and there, and he came in, also.

Q Are you referring to Captain Leyden?

A Right, Captain Leyden.

Q What did he do?

A He advised Thomas of his constitutional rights.

Q Where did he advise him of his constitutional rights?

A Still sitting in the back seat of the car.

Q Where was Captain Leyden sitting?

A He came to the other door, the rear door.

Q You said the other door. Which door are you speaking?

A Rear door on the right side.

Q Did he speak through the window?

A No, he opened the door.

Q Did he get in the car?

A I don't remember if he got in the car.

Q Where was Sergeant Sears at this time?

[314] A Still seated in the back seat with Thomas.

Q You don't remember whether or not Captain Leyden got in the car?

A No, sir, I don't remember. I know he was standing at the door. I don't know if he sat down or not.

Q Did Sergeant Sears use anything to assist him in informing Mr. Innis of his constitutional rights?

A You mean as if he read it off a card?

Q Yes.

A I don't believe so, sir.

Q All right. What did Captain Leyden say to Thomas Innis?

A He advised him of his constitutional rights and then he —

Q Could you be more specific what he actually said? Did he —

A Well, his exact words I don't know, sir. I mean, I don't remember.

Q How long a period of time did that take? Did it — strike that. How long a period of time did Sergeant Sears talk with Mr. Innis?

A I don't know. It's not even a minute, I would say.

Q Less than a minute?

A Not even, sir. That all transpired very fast.

[315] Q Okay. How long a period of time was it between the time that Sergeant Sears concluded or finished giving Mr. Innis his constitutional rights until the time that Captain Leyden began giving Mr. Innis his constitutional rights? How long a period of time transpired between those two things?

A Timewise, I wouldn't know. It was a very short time.

Q Very short?

A Very short time.

Q Happened almost one right after the other?

A Yes, sir.

Q Now, Captain Leyden didn't use anything to assist him in giving him his constitutional rights?

A I don't remember, sir.

Q Was the light on in the car?

A Yes, sir, because the door was open.

Q All right. The door was open?

A Yes, sir.

Q Which door was open?

A Well, the front one and the rear one.

Q And did you observe anything in Captain Leyden's hand?

A No, I don't remember seeing anything.

Q Now, after Captain Leyden concluded speaking to [316] Mr. Innis, what happened?

A Well, we had called for a wagon and we had took him out of the rear seat of my car and placed him into the caged car when they arrived.

Q Who placed him in the caged car?

A I believe it was — I believe it was a sergeant.

Q Sergeant Sears?

A And the men from the wagon.

Q All right. Now, during the period of time that Thomas Innis was in your vehicle, during that period of time, sir, that Sergeant Sears and Captain Leyden spoke to Mr. Innis, did he say anything besides: "I want a cigarette"?

A I don't remember if he said anything or not.

Q You don't remember him saying anything?

A No, sir.

Q Did you have him sign any waiver form?

A At the time?

Q Yes.

A No, sir.

Q Did you have a waiver form with you?

A No, sir.

Q Now, after the wagon left with Mr. Innis in it, what [317] did you do?

A We were just sitting there.

Q Sitting?

A We were still in the street, I mean. They just started driving up the hill.

Q All right.

A And they weren't gone, I don't know how long, very short time.

Q Could you give us —

A Oh, minute to a minute-and-a-half, if that. As far as timewise, I don't know. They didn't get too far away, I don't imagine, because they were right back within a very short time.

THE COURT: Did they get out of sight, Officer?

WITNESS: Yeah. Well, there's a sharp hill right there, Chalkstone Avenue. They went up around the hill.

THE COURT: Is this anywhere near the area of Roger Williams —

WITNESS: No, sir. This is farther up, near Triggs Golf Course. On the other side of Triggs Golf Course, on the downside of the hill, the corners.

[318] Q So, within less than two minutes?

A Less than two minutes.

Q Less than two minutes the wagon came back?

A Yes, sir.

Q And at that time, what did you do?

A Well, he came up — the captain, the sergeant, myself, came up to the wagon.

Q Together the three of you were there?

A Yes, sir.

Q And what happened then?

A Well, the men in the wagon told us that Thomas had told them that he had wanted to show them where the gun was because he didn't want anybody — any kids up there to get hurt because of the school up there.

Q Did someone say that in front of the other two men?

A Sir?

Q Was that said in front of the other two men, Sergeant Sears and Captain Leyden, too?

A Yeah, I believe they were standing right there. They came up and told the captain this. Sergeant Sears and myself were standing there.

Q Now, as a result of that conversation, what did you do?

A Well, we followed Thomas Innis' instructions as to [319] where he left the shotgun, and we went up to this area.

Q He actually led you to that location?

A Yes, sir, because then we drove just so far in a car, then he said it was right along the street here, so we got out of the car and walked.

Q Whose car was he riding in?

A He was still in the wagon.

Q He was in the wagon?

A Yes, sir.

Q Where were you?

A I was right behind the wagon in my car because we went up — well, right around the corner is Obadiah Brown Road. This is where the gun was.

Q Who was in the wagon with Mr. Innis?

A Patrolmen Williams and McKenna, I believe. Yeah.

Q You were following behind?

A Yes, sir.

Q And who was in the car with you?

A At that time, I was alone.

Q Where was Sergeant Sears?

A In his car.

Q Where was Captain Leyden?

A In his car. We were all like a parade going up the hill.

[320] Q There were four cars going up the hill?

A Yes, sir.

Q And did the wagon stop at just one location or what happened?

A He stopped and then Thomas got out, you know. They took Thomas out of the wagon and he walked along the street to show us where the gun was.

Q Did you talk to Thomas again before he began to take you to this location on Obadiah Road or Obadiah Brown Road?

A Repeat?

Q Did you talk to Thomas again while he was in the wagon?

A While he was in the wagon, no, sir. Outside of the wagon.

Q Did Captain Leyden talk to him while he was in the wagon?

A Yeah. When he came up, you know, when the wagon first came back to us, you know, he asked Thomas: "You want to show us where it was," and he said yes.

Q You were there?

A I mean, I couldn't really hear what was being said.

Q So you don't know that?

A The captain had his head inside the car. I really —

Q You don't know. I think —

[321] MR. STONE: Mr. Cerilli is stuck with the answer. He asked the question.

MR. CERILLI: He can explain it.

MR. STONE: He never asked him of his own personal knowledge.

MR. CERILLI: It is quite obvious, your Honor, that he realizes now that he never heard the word. He is just assuming.

MR. STONE: Your Honor —

MR. CERILLI: I will withdraw the question and ask another question.

THE COURT: All right.

MR. CERILLI: Withdraw that question.

Q Did you hear Captain Leyden speak with Thomas Innis in the wagon the second time?

A The second time, no.

Q You don't know what the conversation was?

A No, sir.

Q Okay. And you didn't speak with Thomas Innis?

A No.

Q And Sergeant Sears speak with Thomas Innis?

A I don't remember.

Q You don't remember?

[322] A No.

Q Now, when Thomas Innis got out of the wagon, did you speak with Thomas Innis again?

A Yeah, We were walking side by side along Obadiah Brown Road.

Q Did you inform him of any constitutional rights at that point?

A No, sir.

MR. CERILLI: I have no further questions.

MR. STONE: I have no further questions.

MR. CERILLI: Your Honor, before this officer steps down, may I have a moment, please?

THE COURT: Yes.

MR. CERILLI: I have a few more questions.

Q Just a couple of questions, Officer. While Thomas Innis was in the car with you, did he ask you if you were the same police officer that patrolled that area 20 or 25 minutes ago?

A I don't remember that being asked, no.

Q Did he tell you that he was watching Chalkstone Avenue from a group of pine trees?

A At the scene there?

Q Yes.

[323] A I don't remember that ever being said.

Q Did he ever mention anything about a pine tree, being in a grove of pine trees, or in that area watching?

A Not that I remember at all, sir.

Q So the only conversation you had with him was relative to him asking you for a cigarette?

A Yes, sir.

Q And you telling him —

A "Sure, I'll give you one", and I just gave him one, you know.

Q You gave him a cigarette?

A Yes. That's it.

Q And the only thing that you told him was the constitutional rights as you have testified to earlier this afternoon?

A Yeah.

Q Isn't that true?

A Yes, sir.

MR. CERILLI: I have no further questions, your Honor.

Redirect Examination by Mr. Stone

Q Now, Patrolman Lovell, you say you advised him of his constitutional rights, and I think Mr. Cerilli asked [324] you is that all you said, and your answer was "basically".

A Yeah.

Q I mean, you know, I could have said, you know, like when he asked me: "Can I have a cigarette", "sure, Tom, I'll give you a cigarette", you know. This kind of conversation.

Q My specific question is, could you have said more with reference to his constitutional rights?

MR. CERILLI: Objection, your Honor.

THE COURT: Overruled. You may answer.

A Yeah, I could have. I mean, you know —

Q Well, do you recall exactly what you said?

A You mean as far as his constitutional rights?

Q Yes.

A Yeah. Well, it's basically what I just said, I mean, you know, what I had said earlier, basically, I mean.

Q What do you mean when you say basically?

MR. CERILLI: Your Honor, objection. He's answered the question.

THE COURT: Overruled.

Q Do you understand my question?

A Yeah. You want me, you know, did I add more into the constitutional rights.

[325] Q I just want to know what you mean when you say basically?

A I mean I may not have used the exact words that I used now.

Q Well, can you recall what exact words you did use?

A Just, you have the right to remain silent; anything you say can and will be used against you in a court of law; you got a right to have an attorney while being questioned, and if you can't afford an attorney, one will be appointed by the court.

Q Is that everything that was —

A That's basically what I said.

Q Okay.

A I mean, you know, adding in small words, and, is, you know.

Q But, Officer Lovell, do you understand the difference in what you just said and what you said earlier? You did say more this time didn't you? You understand the difference?

A I didn't realize I said more this time. I mean, you know —

MR. STONE: No further questions.

THE COURT: Thank you, Officer. You may step down.

FRANCIS J. SEARS SWORN

Direct Examination by Mr. Stone

Q Sergeant Sears, can I assume from the uniform that you're wearing that you are employed by the Providence Police Department?

A That's correct.

Q And what capacity?

A I'm a sergeant with the Providence Police Department, Patrol Division.

Q Patrol Division? Were you on duty on the night of — or early morning hours of January 17, 1975?

A I was.

Q And can you recall specifically what area you were in at approximately 4:30 A.M.?

A Yes. I was in the Rhode Island College, Obadiah Brown Field area, in the City of Providence.

Q What caused you to be in that area at that particular time?

A At that particular time, I was on a search with patrolman Lovell for a suspect in that particular area who was known to us as Thomas Innis.

Q Do you see that same Thomas Innis in this courtroom today?

[327] A Yes, I do.

Q Could you point to him, please?

A The gentleman sitting right there.

Q And was your search for Thomas Innis successful?

A Yes, it was.

Q And you apprehended him that night?

A Patrolman Lovell apprehended him that night, correct.

Q And did you arrive in the area where Patrolman Lovell had apprehended him?

A I did.

Q Do you have a — did you have a chance to observe Thomas Innis?

A I did.

Q Is that the same Thomas Innis you see in the courtroom today?

A It is.

Q Okay.

MR. STONE: May the record so indicate?

THE COURT: The record may so indicate.

Q What happened once you arrived in the area where Mr. Innis was?

A When I arrived at that area, Mr. Innis was already in custody by Patrolman Lovell. I asked Patrolman Lovell [328] if he had notified Innis of his constitutional rights, and he said he had. At this time, I notified him of his constitutional rights.

Q And specifically what rights did you notify him of?

A I notified him of the rights that he had to remain silent; the right to an attorney; and he didn't have to say anything at that time, and also that he, because of the procedures that were taking place, he knew he was going to go to Central Station to be transported at that time.

Q And what happened next?

A Shortly thereafter, Captain Leyden responded from the Providence Police and also a wagon was asked for to transport Mr. Innis to Central Station.

Q Did you say Captain Leyden appeared?

A Yes, he did.

Q And what happened when Captain Leyden appeared?

A When Captain Leyden appeared, he notified him of his constitutional rights.

Q In your presence?

A Yes, he did.

Q What happened subsequent to that?

A Shortly thereafter, he was transported to Central [329] Station and on the way to Central Station he explained or exclaimed to the police officers that the gun that he had had was placed in the woods at Obadiah Brown Field, and he wanted to show them where it was because he was afraid there were children or somebody in the area the next day who would injure themselves.

MR. CERILLI: Objection. Motion to strike, your Honor.

THE COURT: Well, it is a little late.

MR. CERILLI: I waited until he completed it.

THE COURT: I will grant the motion to strike. It is hearsay.

Q Well, did he return to where you were?

A Yes, he did.

Q And what happened when he returned?

A When he returned at this time, he went alongside of the road, Obadiah Brown Road, and he searched up and down the road for a short period of time, then he found a shotgun.

Q He was doing the searching?

A He was with the police.

Q And you were just close by observing?

A Correct.

[330] Q Now, this conversation that you said that Innis had related to persons in the wagon, was there a call back over the radio?

A Yes, there was.

Q And what did the call say?

A The police officer at that time stated to us that he was returning to Obadiah Brown Road with the subject who stated at that time he wished to show us where the gun was.

MR. STONE: I have no further questions.

Cross-Examination by Mr. Cerilli

Q Where were you — strike that. Sergeant Sears, where was Mr. Innis when you informed him of his constitutional rights?

A He was sitting in the police car, Patrolman Lovell's police car, when I arrived.

Q Front seat or back seat?

A He was in the — if I recall correctly, he was in the back seat.

Q And where were you?

A I was in the back seat.

Q And did you use anything to assist you in informing him of his constitutional rights?

[331] A At that time, no.

Q When did Captain Leyden inform him of his constitutional rights?

A Shortly thereafter. A few minutes.

Q And what did Captain Leyden state to Mr. Innis when he informed him of his constitutional rights, if you can recall?

A He informed him he had a right to an attorney; he didn't have to say anything, he could remain silent; that he was a subject that they were looking for, and that he was going to be transported to Central Station.

Q Is that it?

A If I recall correctly, yes.

MR. CERILLI: I have no further questions of this witness, your Honor.

Q You say to the best of your recollection that's what Captain Leyden said?

A Yes.

Q In your presence?

A Yes.

Q Now, can you recall whether or not he indicated that if Mr. Innis could not afford an attorney one would be [332] appointed?

MR. CERILLI: Objection, your Honor.

THE COURT: Sustained.

MR. STONE: Your Honor, I'm just attempting to refresh his memory. I asked if he recalled that.

THE COURT: It seems to me you will have to get the captain in. You are asking these people to state something for the truth of this statement. It seems to me it is rank hearsay, regardless of who asks for it.

MR. STONE: Well, I couldn't agree more but Mr. Cerilli asked him on cross-examination.

THE COURT: I thought you would object. You did not.

MR. STONE: Well, I have no reason to object. I wanted to hear what he was going to say. I'm asking now based on his answer, could he recall that being said.

THE COURT: Sergeant Sears, think a moment, think very carefully and see if you can recall exactly what was conveyed to the defendant, Mr. Innis, as to his constitutional rights, both at the time you gave them to him and at the time Captain Leyden gave them to him.

[333] MR. CERILLI: I will object to the Court asking this witness that question.

THE COURT: Your objection is overruled. Your exception is noted.

A What I recall is, your Honor, is that when Captain Leyden responded, he asked me in the presence of Patrolman Lovell if we had notified him of his constitutional rights. At this time we said yes. He then again proceeded to notify him of his constitutional rights. If I can remember correctly, he notified him that he had the right to an attorney; the right to remain silent; anything that he said could be used against him. This is about all I recall at that particular time.

Q Now, with reference to what you said to Mr. Innis, can you recall specifically what you said?

A Just that he —

MR. CERILLI: Objection, your Honor. This has already been gone over a number of times.

THE COURT: Overruled. You may answer.

A I remember when I entered the police car, I asked Patrolman Lovell if he had notified him of his constitutional rights. He said yes. We then proceeded [334] to notify him of his constitutional rights, the right to remain silent; the right to an attorney; he didn't have to say anything at this particular time, and that was it at this particular time that I remember myself.

Q What specifically did you say with reference to a right to an attorney?

MR. CERILLI: Objection, your Honor. He already indicated what he said.

THE COURT: Overruled.

A I don't recall. I don't recall anything further as far as the statement I made.

MR. STONE: I have no further questions.

MR. CERILLI: I have no further questions of this witness.

THE COURT: You may step down, Sergeant.

MR. STONE: Your Honor, could we take a brief recess? I don't know if Captain Leyden is outside or not. I know there were only two to begin with.

THE COURT: All right.

(Recess)

[335] (Defendant enters)

THE COURT: Call your next witness, Mr. Stone.
MR. STONE: Captain Leyden.

JOHN J. LEYDEN SWORN

Direct Examination by Mr. Stone

Q Captain Leyden, by whom are you employed?
A Providence Police Department.
Q How long have you been so employed?
A Twenty years.
Q And were you on duty on January 17, 1975?
A Yes, sir, I was.
Q And were you in the area of Rhode Island College anytime during that duty shift?
A Yes, sir I was.
Q More specifically, were you in that area approximately 4:30 a.m.
A Yes, sir, I was.
Q And why were you in that area?
A I was in the South Hill, Mount Pleasant area. I received a call on the air that they had made an apprehension of the defendant Thomas Innis. As a result of that call, I responded to Triggs Memorial and [336] Obadiah Brown area.
Q And did you see Thomas Innis?
A Yes, sir, I did.
Q Do you see him in the courtroom today?
A Yes, sir, I do.

Q Could you point to him, please?
A This man sitting beside counsel table.
MR. STONE: May the record indicate that the witness has identified Mr. Innis?
THE COURT: The record may so indicate.
Q That's the same Thomas Innis you saw on the morning of January 17, 1975?
A Yes, sir.
Q And did you have any conversation with Mr. Innis, sir —
A Yes, sir, I did.
Q — when you saw him?
A Yes.
Q What was that conversation?
A On my arrival, I advised the defendant of his constitutional rights.
Q More specifically, what did you say?
A I notified him of his right to remain silent; that anything he said could be held in a court of law [337] against him; that he had the right to an attorney; if he couldn't afford an attorney one would be provided for him by the State of Rhode Island. I then asked him if he understood his constitutional rights, and he said he did.
Q And then what else did he say, if anything at all?
A He said he wanted an attorney.
Q Said he wanted an attorney? And what happened subsequent to that?
A At that point, I directed him to a caged wagon to be transported to the Central Station.
Q And did anything else happen?
A I was getting ready to wrap it up at the scene and I received a call from the dispatcher that the wagon that was transporting the defendant wanted to go back, that the subject wanted to show us where the gun was.

Q Did the wagon return?

A Yes, sir, it did.

Q What happened when the wagon returned?

A Thomas Innis, the defendant, was taken out of the wagon. I again advised him of his constitutional rights.

Q What did you advise him at that time?

A His right to remain silent; that anything he said [338] could be held in a court of law against him; he had the right to an attorney, one would be provided for him by the State of Rhode Island, did he understand those rights.

Q And what did he say then?

A He said he did and he wanted to show us where the gun was.

Q Did he say why he wanted to show you where the gun was?

A Because of the school that was in the area, there was going to be small kids around.

Q And in fact, did he show you where the gun was?

A Yes, he did.

MR. STONE: I have no further questions.

Cross-Examination by Mr. Cerilli

Q Officer, where was Mr. Innis when you first saw him on that day of January 17, 1975?

A Okay. He was on — going down past Triggs Memorial Golf Course, there is one intersection going into Obadiah Brown, or the Pleasant View School. That's on your right-hand side going towards Manton. There is another intersection, a small intersection, that goes into a small playground area. He was standing on the sidewalk with several policemen.

Q All right. Who was he standing with?

[339] A Patrolman Robert Lovell — it had to be almost the entire S.D., Subdistrict men from the north end area.

Q How many police officers would that be?

A On that particular night out, I would say probably about a dozen.

Q Twelve police officers?

A In all. I would say so.

Q And they were all surrounding Mr. Innis?

A No, they weren't all. They were in the general area. There were probably three or four surrounding the defendant.

Q And as you approached him, was he handcuffed?

A Yes, sir, he was.

Q What was the first thing you said as you approached him?

A I advised him of his constitutional rights.

Q Is that the first thing you said?

A That's right.

Q You certain?

A Yes, sir.

Q You talk to anyone else?

A Did I? Did he talk?

Q Did you talk to anyone else?

A At the scene, I might have talked to the policemen, to [340] direct them, after I notified him of his rights, just to give orders, that's all.

Q Did you use anything to assist you in informing Mr. Innis of his constitutional rights?

A No, sir, I did not.

Q Was it by memory?

A Yes, sir.

Q All right. And this occurred right on the street?

A Yes, sir.

Q And what was the next thing that you did?

A After advising him of his rights, I ordered him taken in the caged wagon to the Central Station.

Q And was he placed in the caged wagon?

A Yes, sir, he was.

Q Did you talk to him after you advised him of his constitutional rights and after he told you that he wanted an attorney?

A No, sir, I did not.

Q You did not? Now, how long a period of time did this whole transaction take place?

A Couple of minutes.

Q Couple of minutes. Did he sign a waiver form?

A No, sir, not at that point.

[341] Q Did Mr. Innis leave the scene?

A Yes, sir.

Q And he left the scene in the wagon, I imagine, caged?

A Caged police car, yes.

Q Okay. How long was that caged vehicle gone before it returned to the scene?

A Couple more minutes.

Q And where were you —

A I hadn't left the scene at that point.

Q Where were you?

A I was right directly right at about the playground area off Chalkstone Avenue at Obadiah Brown or the Triggs complex.

Q When Mr. Innis returned to the scene, in the caged vehicle, where did you talk with him?

A I had him taken out of the caged vehicle, right at the entrance. Now we're moving up maybe a couple of feet from the prior location where he was apprehended.

Q You know who took him out of the caged vehicle?

A It would be the men assigned to the wagon that night. Let's see, Patrolman Joseph Gleckman, Patrolman Walter

Williams, and at the — when he was ordered down in the wagon, I put a third policeman on the other side of him in [342] the back of the car.

Q And where did you put him when you took him out of the caged vehicle? Where was he placed? Was he left on the street, put in the vehicle, if you know?

A I — when I took him out of the vehicle the second time, put him back after he told me about where he was going to show us where the gun was — excuse me, I put him back in the wagon to be transported down to Obadiah Brown across from Pleasant View School.

Q So, I understand this correctly, he was taken out of the caged vehicle and you spoke with him where?

A Right on the street.

Q Okay. Who was present?

A It would be — let's see, Sergeant Sears, Patrolman Lovell, Patrolman Gleckman, Patrolman Williams and Patrolman Richard McKenna.

Q Were these officers present when you informed him of his constitutional rights the second time?

A Yes, sir, they were.

Q And was he informed of his constitutional rights the second time on the street at that location?

A Yes, sir.

Q And what was his response after informing you of his [343] constitutional rights the second time

A He wanted to get the gun out of the way because of the kids in the area in the school.

Q Now, after he was placed in the vehicle, after he was placed in the caged vehicle, again, did you follow in that vehicle or did you get in that vehicle? How did you — how were you led to the gun?

A Okay. I had him proceed down Obadiah Brown Road. I had my police car. I summoned some more police cars to the

scene for the use of their headlights, then lined the police cars up on the Pleasant View side of the street so that I could have an unobstructed view, or good view, of where we were searching for the weapon.

Q Were you in the caged vehicle?

A No, sir.

MR. CERILLI: I have no further questions of this witness.

MR. STONE: I have nothing further. I will have the two patrolmen in the vehicle Monday morning, your Honor, if that is necessary.

THE COURT: Do you intend to present any witnesses of your own, Mr. Cerilli, in regard to this voir dire, this particular portion of the case?

[344] MR. CERILLI: No, your Honor. However, based on some of the information that Captain Leyden has supplied, he's put a different twist on this, and there are a number of cases — I had a similar situation before — I don't have those cases with me and I like the opportunity to supply the Court with those. I wasn't prepared to argue on that. I prepared a different argument. I was preparing a different argument based on the other two officers. Now there's been a little change, so I don't know.

THE COURT: Yes, there has been a change.

MR. CERILLI: I don't know if I'd be prepared to argue right now on that. I do have the memo on the other.

THE COURT: I would like that. I will use it over the weekend.

MR. CERILLI: For the record, I have given counsel for the State, Mr. Stone, a copy of this.

THE COURT: With regard to the Aubin testimony?

MR. CERILLI: That's the answer in regards to the admission of the second cab driver, Mr. Aubin.

THE COURT: All right. I will review that over the weekend. We will resume at 9:30 Monday morning. [345] I want

to start this voir dire, complete it, not only on this point but on the Aubin testimony, so that we can resume the trial, depending on my rulings, as early as possible in the morning. I will see counsel in chambers briefly.

(Conference in chambers)

(Court adjourned)

[346] 10 NOVEMBER 1975 — MORNING SESSION

(Defendant enters)

THE COURT: Good Morning, Gentlemen. Let the record reflect the jury is not present.

JOSEPH GLECKMAN, SWORN

Direct Examination by Mr. Stone

Q Is it Patrolman Gleckman?

A Yes, it is.

Q By whom are you employed?

A Providence Police Department.

Q How long have you been so employed?

A Two years.

Q And were you on duty on the A.M. of January 17, 1975?

A Yes, I was.

Q Do you have an occasion to respond to the area of Obadiah Hill, Chalkstone Avenue, Rhode Island College, that general area?

A Yes, I did.

Q Approximately what time?

A Approximately 4:32.

Q And what was the purpose of your responding to that area?

A Patrolman Lovell of the Providence Police Department [347] had apprehended a subject wanted in assault and robbery.

Q And did say you did respond to that area?

A Yes, I did.

Q What happened when you responded to that area?

A At this particular point when I responded, Patrolman Lovell was there with Captain Leyden, I just pulled up, parked my car and went over to the scene. At this point, Captain Leyden, our superior, was administering the rights to a subject who was wanted at that point.

Q And do you see that subject in the courtroom today?

A Yes, I do.

Q Could you point to him, please?

A The subject right here.

Q Could you indicate what he has on?

A He's got a dungaree jacket, a brown and tan print shirt.

MR. STONE: May the record indicate that the witness has pointed to the defendant Thomas Innis?

THE COURT: The record may so indicate.

Q You say you heard Captain Leyden advise this suspect of his rights?

A Right.

Q What did you hear Captain Leyden say?

A He had stated to him he has the right to remain silent, [349] anything he says can and will be used against him in a court of law; he has the right to an attorney while being questioned, and if he can't afford an attorney, the State will appoint him one. At this point, he said, "Do you understand these rights", and he says: "Yes", and, "I'd like to have an attorney."

Q And then what happened?

A At this point, the captain stated: "Take him down in the wagon and keep him in the front office until I get there."

Q Okay. And did you proceed to take him down in the wagon?

A Yes, I did. See, here was the case, I was in Car 27 and there was two other subjects and two other patrolmen in the wagon. Now, he said: "One of the guys in the wagon go in the back make sure everything is all right, and I'll ride in the front." Now, at this time, we proceeded down Chalkstone Avenue.

Q Wait a minute, we're still standing there. Did you get in the wagon?

A Yes, I did get in the wagon.

Q You didn't get back in Car 27?

A No, I didn't. I parked my car there. Now, we all got in the wagon and proceeded down Chalkstone Avenue towards Manton Avenue.

[350] Q Where were you in the wagon?

A I was in the front?

Q Who else was in the wagon?

A Patrolmen —

Q Where was Patrolman McKenna?

A Driving.

Q Was anyone else in the wagon?

A Patrolman Williams was in the back seat with the subject.

Q Patrolman McKenna was driving?

A Right.

Q You also were in the front?

A Yes.

Q What happened then?

A At this point, I was talking back and forth with Patrolman McKenna stating that I frequent this area while on patrol

and there's a lot of handicapped children running around in this area, and God forbid one of them might find a weapon with shells and they might hurt themselves.

Q Who were you talking to?

A Patrolman McKenna.

Q Did you say anything to the suspect Innis?

A No, I didn't.

[351] Q Did he say anything to you prior to this?

A At this point he stated "stop".

Q No. My question, prior to your saying that, had the defendant said anything?

A No.

Q Had anybody said anything to him?

A No.

Q And you were talking to Patrolman McKenna?

A Right.

Q And what happened next?

A At that point, as I was saying, there is kids running around there, as it is a handicapped school, and he says, you know, back and forth with Patrolman McKenna, he at this point said: "Stop, turn around, I'll show you where it is." At this point, Patrolman McKenna got on the mike and told the captain: "We're returning to the scene of the crime, or where the weapon might be, and the subject is going to show us where it will be."

Q Did you return to the scene?

A Yes, we did.

Q What happened when you returned to the scene?

A At this point we was met by Captain Leyden who administered his rights again.

[352] Q What did he say?

A He says he has the right to remain silent; anything he says can and will be used against him in a court of law; he has the right to an attorney while being questioned, and if he can't

afford an attorney the State will appoint him one, do you understand. And he says yes. And at that point, he says he'll show us, and we proceeded to a few spots, where it wasn't. He said it's in the general area. At this point we proceeded down the road a little ways and there was the shotgun under certain couple rocks and just above was the shells.

MR. STONE: I have no further questions.

Cross-Examination by Mr. Cerilli

Q Now, Officer Gleckman, which way did this vehicle proceed —

A We proceeded —

Q — when it left the scene?

A After we all entered the wagon, we proceeded down Chalkstone Avenue towards Manton Avenue.

Q How far had you gone down Chalkstone Avenue before you turned around?

A Well, we proceeded down Chalkstone Avenue. At the intersection of Manton and Chalkstone, we turned heading going towards up Manton Avenue back towards [353] our city, about I approximately say a mile, you know. We started to turn around.

Q A mile down Manton Avenue?

A No. Well, the whole distance between Chalkstone and Manton was approximately a mile.

Q And during this time, the only conversation you had was with Patrolman McKenna?

A That's correct.

Q And that conversation was what?

A Well —

Q The entire substance of the conversation.

A Well, I was talking back and forth about children in the area, this handicapped school, this Moses Brown or Obadiah Brown School up there, and there is retarded children running around up there, and they play in this area on their breaks, and you know, back and forth, and at this point the subject stated: "Turn around, I'll show you where the weapon is."

Q And this conversation, did you mention — did you speak to Mr. Innis at all during this period of time?

A No. I was talking back and forth. I was in the front. I talked back and forth to McKenna.

THE COURT: Could you tell me whether or not [354] this vehicle you were riding in had a separate cab for the driver and where you were seated?

WITNESS: Yes, it is a caged car, your Honor.

THE COURT: Caged car?

WITNESS: It is a screen.

THE COURT: So that you can be overheard?

THE WITNESS: Absolutely. It is like, your Honor, you know, a screen, and there's little spaces, you know, just in case there was only one guy in the wagon he could still transport a subject in the back.

Q Now, you heard the defendant ask for an attorney, did you not?

A Yes, I did.

Q Did he indicate exactly who the attorney would be?

A No, he didn't. I didn't hear that if at all he said that.

Q Did the captain inform you that all questioning should cease of this defendant?

A Yes, he did.

Q Did the captain tell you not to intimidate or coerce him in any way?

A Absolutely. Just transport him down and I'll see him in the front office.

Q All right. Now, where was Patrolman Williams seated?

[355] A He was sitting in the back with the subject.

Q Was he having any conversation with the subject?

A No, I didn't hear anything.

Q Nothing at all?

A Nothing. I didn't hear anything.

Q Were you the only one talking?

A I was talking back and forth to McKenna.

Q Was McKenna talking at all?

A No. I started the conversation. He said: "Yeah, I realize this is a handicap school." That's what he replied after I told him children play in the area.

Q Did McKenna say anything else besides: "I realize it's a handicap school"?

A No. I was doing most of the talking at this time.

Q So you did most of the talking with only a response from McKenna saying: "Yes, this is a handicap school."

A Right.

Q And then this outburst by the defendant?

A Right, that he —

Q Is that a true statement?

A That's a true statement that he said he would stop, turn around, I'll show you where the weapon is.

Q And when you arrived back on the scene, he was informed [356] of his constitutional rights again?

A Absolutely.

Q Was he informed — strike that. Was he asked whether he wishes to waive his right to counsel.

A No, I can't recall that if at all he said that.

MR. CERILLI: I have no further questions.

Redirect Examination by Mr. Stone

Q And it is your testimony that once you returned to the scene, Captain Leyden did advise him of his rights?

A Yes, he did.

Q And after that you did say that Captain Leyden asked him if he understood that?

A Yes, I heard him say that.

Q He said: "I'll show you where the shotgun is."

A Yes.

MR. STONE: I have no further questions.

THE COURT: You may step down.

[357] RICHARD G. MCKENNA SWORN

Direct Examination by Mr. Stone

Q Patrolman McKenna, by whom are you employed?

A By the Providence Police Department.

Q How long have you been so employed?

A Eight years.

Q Were you on duty on the A.M. of January 17, 1975?

A Yes, sir.

Q And did you have an occasion to be in the Chalkstone Avenue area at approximately 4:30 A.M.?

A Yes, sir.

Q What was the purpose of your being in that area?

A I was summoned there by Patrolman Lovell and Sergeant Sears.

Q What purpose?

A To transport a prisoner.

Q And did you respond to that area?

A Yes, sir.

Q And did you transport a prisoner?

A Yes, sir.

Q And you know who that prisoner was?

A Yes, sir.

Q Who was that prisoner?

[358] A Mr. Innis.

Q You see him in the courtroom today?

A Yes, I do.

Q Could you point to him, please?

A That gentlemen sitting there with the blue coat on, denim jacket.

Q Okay.

MR. STONE: May the record indicate the patrolman indicated the defendant Innis?

THE COURT: The record may so reflect.

Q You say you were summonsed? Were you driving the vehicle?

A No. I was the — more or less driving shotgun. Patrolman Williams was the driver of the vehicle.

Q All right. When you got there to the scene, what happened?

A Well, when I arrived on the scene, the Sergeant Sears and Patrolman Lovell had Mr. Innis in custody, and more or less they had him by the arms, holding him by the arms.

Q Okay. And did you in fact transport him — place him in the vehicle?

A Not at that point. We were waiting for Captain Leyden to respond at the scene, and he did so within about a 30 or 40 seconds after I had arrived.

[359] Q Now, you arrived with who, Williams?

A Patrolman Williams.

Q All right. And after Captain Leyden responded to the scene, what happened?

A Well, at this time Captain Leyden approached Mr. Innis and notified him of his constitutional rights.

Q Did you hear what Captain Leyden said?

A Yes, sir.

Q What did he say?

A He stated to Mr. Innis that he had a right to remain silent; that he had a right to talk to an attorney while any questioning took place, and also that he had a right — well, let's see how he worded it. Also, he asked him if he understood his constitutional rights, and at this point Mr. Innis stated that he wanted an attorney. At this point, Captain Leyden didn't say anything further to him. He just told me and Patrolman Williams to place the man in the wagon.

Q Did anyone else ride with you in the wagon?

A Yes. He ordered Patrolman Gleckman to ride with us.

Q Now, who drove the wagon back?

A Patrolman Williams drove and I sat in the front seat and Patrolman Gleckman got in the back seat with the subject.

[360] Q Patrolman Gleckman got in the back seat with the subject?

A Right.

Q And what happened then?

A Well, Gleckman was talking, you know, to me and Williams, and he made the statement that it was more or less a shame that the weapon would be left up in that area with the ammunition. He travels up in that area quite a bit and he felt that some kids might come upon it and, you know, fire the weapon off or maybe get hurt themselves with it.

Q And what then happened?

A At this point, Mr. Innis stated to us that he would show us where the weapon was. His exact words were, if I can remember correctly, were: "I'll show you where the weapon is. Turn around and take me back."

Q And what happened then?

A At this point, I radioed Captain Leyden that we were returning to the scene and that would he be present there when we arrived.

Q And what happened next?

A Well, we arrived back at — I believe, it's Obadiah Brown Road, and Captain Leyden was there, along with many [361] other police vehicles, and patrolmen, and we started lining up the vehicles to search for the weapon.

Q And did you find the weapon?

A Yes, we did.

Q Did you observe Captain Leyden saying anything to Mr. Innis when you came back?

MR. CERILLI: Objection.

A I don't recall at that point. I wasn't with the prisoner right next to him. I believe Patrolman Gleckman had ahold of the prisoner at that point.

MR. STONE: I have no further questions.

Cross-Examination by Mr. Cerilli

Q Officer McKenna, did you hear the defendant asking for a specific attorney when he indicated he wanted an attorney after Captain Leyden had given him his rights?

A No, I did not.

Q All right. Now, did you place the defendant in the vehicle or did someone else place him in the vehicle?

A I believe I assisted in placing him in the vehicle.

Q What type of vehicle was it?

A Well, it's what we call a caged car. It has the screen separating the back seat from the front.

Q It's not a van?

[362] A No, no. No, it's an open vehicle. It's a four-door sedan with the caged back.

Q And you recall the defendant getting in the front seat or the back seat?

A He was placed in the back seat.

Q Do you recall who placed him in the back seat?

A Well, like I said, I believe I assisted him getting in the back seat, along with Patrolman Williams, and Gleckman was standing nearby. I don't know whether he actually assisted in placing him in the vehicle. At this point the subject was handcuffed and we more or less helped him to get in, seeing he didn't have his arms free.

Q And you sat in the front seat, shotgun?

A Yes.

Q Where did Williams sit?

A Williams was the driver.

Q And where did Gleckman sit?

A In the back seat with the subject.

Q All right. Now, how far had you traveled before the defendant indicated he wanted to show you where the weapon was?

A A very short distance. I would say no more than maybe [363] half-a-mile, three-quarters of a mile.

Q Which direction did you head down Chalkstone Avenue?

A Well, the vehicle was facing down Chalkstone Avenue and we proceeded down Chalkstone Avenue, more or less like out of the city, towards Manton Avenue where the junction is, and we took a left-hand turn on Manton Avenue, continuing back into the city.

Q Do you recall the exact words of Gleckman before the defendant indicated that he would show you where the weapon was?

A I don't know the exact words he used. We were only having a more or less like a conversation, and as I stated, he more or less indicated the seriousness of having the weapon, you know, laying free in that area, with the ammunition to it, because of the fact that so many children play in that wooded section.

Q Did you say anything?

A I more or less concurred with him that it was a safety factor and that we should, you know, continue to search for the weapon and try to find it.

Q And did you say anything else?

A No, sir.

Q Did Williams take part in this conversation?

[364] A I don't remember or recall him saying anything specific, no. He may have made a comment more or less along the same lines, but I don't remember.

Q What did Gleckman say to Innis?

MR. STONE: Objection. There hasn't been any testimony he said anything.

THE COURT: It is cross-examination. I will allow the question.

MR. STONE: But there is no foundation and there has been no testimony by any witnesses that anyone said it, and I think it's far beyond the scope of direct examination.

THE COURT: I have ruled. Your exception is noted.

A I don't believe that there was any conversation between Mr. Gleckman and Mr. Innis in respect to the weapon. I don't know if there was anything else said. I don't think there was. I don't recall anything being said.

Q Was there any conversation between Williams and Innis?

MR. STONE: Objection. There's been no testimony on that either.

THE COURT: The question is, was there any conversation between Williams and Innis.

[365] MR. STONE: Withdraw the objection.

THE COURT: You may answer.

A I don't believe there was. I don't believe Williams talked to him at all.

Q Was there any conversation between you and Mr. Innis?

A No, there was not.

Q None at all? Now, when you overheard Captain Leyden giving the defendant his rights, did he give any instructions to you and the other fellow officers before you took him down to the — the defendant, before you took the defendant down the station.

A Well, the only instructions there were, were to transport him to the Central Station and to the business office, which is just routine procedure in any prisoner being taken in.

Q And when the defendant was taken back to the scene where the Captain Leyden was, was he asked whether or not he wished to waive his right to counsel, that he's already indicated he wanted?

A Would you please repeat that question?

Q All right. When the defendant Innis was brought back to the area of Obadiah Brown Road, was he asked whether or not he wishes to waive his right to counsel?

[366] MR. STONE: Objection. It calls for a conclusion. The witness testified he didn't hear what he said when he came back. If he asks if he knows, I will withdraw the objection.

THE COURT: The witness certainly will. If he heard nothing, he will so state. Overruled. It is cross-examination. You may answer.

A When we arrived back at the scene, I believe Patrolman Gleckman got out one side of the vehicle with the prisoner, I got out the other side of the vehicle, Captain Leyden was present there, and I know he was on that side of the vehicle but I did not hear the conversation that took place.

MR. CERILLI: I have no further questions.

Redirect Examination by Mr. Stone

Q Now, Patrolman Gleckman, when Innis was placed in the vehicle, I think you testified you assisted Patrolman Williams, is that correct?

A Right.

Q And I want you to try to recall, you say Gleckman was standing off to the side?

A He was right there at the vehicle. I mean off to the side, maybe a few feet away from the door.

[367] Q All right. Who put Innis into the vehicle?

A I believe it was myself and Williams, or Gleckman. I don't recall exactly but I know I was there and I took the prisoner by the arm.

Q Now, who got in beside him?

MR. CERILLI: Objection, your Honor. We have gone all over this.

THE COURT: Overruled.

Q Now, I want you to stop and think about this.

MR. CERILLI: Objection, your Honor, to that type of comment to this witness, and I wish the Court to instruct —

MR. STONE: This is some ten months ago, your Honor.

THE COURT: Ask your question. Let the witness think and answer. You may answer.

A Would you repeat the question again, please?

THE COURT: Read it back, Mr. Gallucci.

(Read)

This would be the defendant who got in beside him.

A If I remember correctly, the vehicle — Innis was placed in it and the vehicle door was closed, and we were waiting for instructions from Captain Leyden. [368] At that point, Captain Leyden instructed Patrolman Gleckman to accompany

us. There's usually two men assigned to the wagon, but in this particular case he wanted a third man to accompany us, and Gleckman got in the rear seat. In other words, the door was closed. Gleckman opened the door and got in the vehicle with the subject. Myself, I went over to the other side and got in the passenger's side in the front.

Q And who drove the vehicle?

A Williams drove the vehicle.

MR. STONE: I have no further questions.

MR. CERULLI: I have no further questions.

THE COURT: You may step down. Thank you.

[369] WALTER WILLIAMS SWORN

Direct Examination by Mr. Stone

Q Patrolman Williams, are you employed by the Providence Police Department?

A Yes, sir.

Q How long have you been so employed?

A Four years.

Q Four years?

A Almost.

Q And did you have an occasion to be on duty on the A.M. of January 17, 1975?

A Yes, I was.

Q And more specifically, were you in the area of the Chalkstone Avenue at approximately 4:30 A.M.?

A Yes, I was.

Q What was the purpose of your being in that area?

A I was assigned to a wagon to transport a subject that was found in the Chalkstone area.

Q When you say a wagon, could you describe the vehicle you were assigned to?

A It is a regular car with a screen in the back seat.

Q Screen?

[370] A Right.

Q You consider that a wagon?

A Yeah, sometimes I do.

Q Okay. And you say you were assigned to that wagon, to do what?

A To transport a subject from Chalkstone Avenue.

Q Did you transport a subject?

A Yes, I did.

Q Did you or do you know the subject's name?

A Innis was his last name.

Q Do you see that subject in the courtroom today?

A Yes, I do.

Q All right. Could you point to him please?

A (Pointed).

Q What does he have on?

A Got a blue denim jacket on.

MR. STONE: May the record indicate that the witness has identified Innis, the defendant?

THE COURT: The record may so indicate.

Q You say you transported him?

A Right.

Q And what happened when you arrived at the scene, if you can recall?

[371] A Oh, when I arrived at the scene, right following after we arrived there, Patrolman McKenna and I were assigned to the wagon. Captain Leyden pulled up right behind us. He got out of his car, went up to the subject, which is Mr. Innis over here, and he told him he had the right to remain silent; anything he said will and may be used against him in a court of law; that he had the right to an attorney and have him present with him while he was being questioned, and he also stated to him that if he couldn't afford an attorney the Court

would appoint him one. He asked him if he understood his rights, and at this time Mr. Innis said he wanted to see his attorney.

Q And then what happened?

A Then Captain Leyden ordered us to put him back in the wagon and transport him to the station.

Q And did you do so?

A Yes, we did. Patrolman McKenna and Patrolman Gleckman were sitting in the front and I sat in the rear seat with Mr. Innis.

Q Who was driving?

A Patrolman McKenna.

Q And what happened? Which way did you go?

A We went down Chalkstone toward Manton Avenue.

[372] Q How far did you go from the original scene — strike that. Did anything unusual happen then?

A Patrolman Gleckman started talking to McKenna about the kids in the area of the school, the handicapped kids, that they could find the weapon and they could get hurt with it.

Q And they were in the front seat?

A Right.

Q And you were in the back seat?

A Right.

Q With Innis?

A Right.

Q Now, what happened then?

A Well, at that — while they were talking, Mr. Innis says: "Stop the car. Turn around and I'll show you where the gun is."

Q Had you said anything to Mr. Innis?

A I didn't say a word.

Q Had Gleckman said anything to Mr. Innis?

A No.

Q Had McKenna said anything to Mr. Innis?

A No.

Q After Innis said that, what happened?

[373] A We turned around. Patrolman McKenna picked up the radio and called the captain. We returned back to the scene.

Q Now, how far had you gone from the original scene?

A Within a mile.

Q Within a mile? And what happened when you returned to the scene?

A When we got there, there was already several cars there looking in an area for a gun. We got there — when we got there, the captain was pulling up right behind us again.

Q What captain is this?

A This is Captain Leyden.

Q Okay.

A And at this time the captain had told him to come out of the car, and he and Patrolman Gleckman went off one way and I went with another patrolman looking for the gun, scanning the area.

Q Did you observe Captain Leyden saying anything to Innis?

A I heard him say something. I couldn't hear what he was saying. I was going in another direction.

MR. STONE: I have no further questions.

Cross-Examination by Mr. Cerilli

Q You remember the substance of Gleckman's conversation [374] exactly? Do you remember exactly what Gleckman said?

A He said it would be too bad if the little — I believe he said a girl — would pick up the gun, maybe kill herself.

Q Maybe kill herself?

A Yes (Nodded).

Q And did he say anything else?
A No.
Q That's it?
A I don't think so. I don't recall him saying anything else.
Q Did McKenna say anything?
A He said: "Gee, it would be too bad", or something like that.
Q And that's it?
A Yes (Nodded).
Q All right. Did Mr. Innis request the presence of any particular attorney?
A Any particular one?
Q Yeah.
A No.
Q And where did you turn around and come back?
A We were approaching Manton Avenue and Chalkstone.
Q Approaching?
[375] A Yes (Nodded).
Q Before you came to the intersection?
A I believe so, either that or right at the intersection.
Q Why don't you give us the route that the vehicle took from the scene of the arrest?
A Our vehicle?
Q Yes.
A Okay. It would be westbound on Chalkstone Avenue. That would be going into Manton.
Q When you reached the intersection of Manton and Chalkstone, what did you do?
A Well, before we reached it, he, Patrolman Gleckman, was talking about the little kids in the area of the school, and right before we reached the intersection Mr. Innis said: "Turn around and I'll show you where the gun is." And at the time we were approaching the intersection and at that time we turned around.

Q How far in miles, if there are more than one mile, from the arrest scene to the place where you turned around?
A Arrest scene? It's between a half-mile and a mile, I would say.
MR. CERILLI: I have no further questions [376] of this witness.
MR. STONE: Would you like Mr. Aubin now or —
THE COURT: No. There are two matters and we will take one at a time.
MR. CERILLI: If your Honor please, may I have a moment to confer with my client?
THE COURT: Yes, you may.
MR. CERILLI: Your Honor, if the Court please, I have discussed with Mr. Innis the possibility of taking the stand. I have explained to him that for the purposes of this hearing, he could take the stand and in fact it would not go before the jury.
THE COURT: That is correct.
MR. CERILLI: However, at this time, after discussing the pros and cons with Mr. Innis, Mr. Innis wishes not to take the stand.
THE COURT: Very well.
MR. CERILLI: And which is his right under our constitution.
THE COURT: Absolutely.
MR. CERILLI: So, that the defense will not present any witnesses at this particular time.
THE COURT: All right. Does the State rest [377] with regard to this particular voir dire, Mr. Stone?
MR. STONE: Yes, your Honor.
THE COURT: And the defense rests?
MR. CERILLI: Yes, your Honor.
THE COURT: I will hear argument.

(Argument presented by counsel)

THE COURT: It is clear from the evidence that the evidence presented contained some discrepancies as to who sat where in the automobile; those discrepancies are not at all vital or disturbing to the Court. The real issue is, did this defendant have the benefit of his Miranda Warnings at the time he was apprehended, at the time he was placed in the car for transport to the police station, and at the time he returned apparently volunteering to locate the weapon.

The Court is completely satisfied after hearing the police witnesses testify that this defendant was repeatedly and completely advised of his Miranda rights. It is entirely understandable that a police officer not used to testifying, could forget one of the phrases of the warnings when testifying. When questioned, it came back to mind.

I would point out parenthetically that it is quite obvious to the Court that these witnesses who testified this morning were not rehearsed nor did they get together and [378] compare notes before testifying. They have disagreed with each other on unimportant particulars. That evidence impresses me as to its credibility. I must note that.

When the request for counsel was made, first time, second time, possibly third time, because there was the original officers and then Leyden: "I want an attorney", the proper thing happened. The defendant was placed in the car and ordered transported to headquarters.

In the automobile, driving along Chalkstone Avenue, we have three officers who are out at four in the morning, or later, and have been prowling around searching for a weapon which they had reason to believe was there. The weapon was either loaded or with shells. It is in the area of a school where when daylight arrives handicapped and retarded children will be coming to the area. I think it is entirely understandable that they would voice their concern to each other. And I have

to say that I commend the defendant for responding to the danger which, more than likely, he did not know of up until that time. There is no reason for me to believe, and no evidence on which I should conclude, that he was familiar with the area and the type of facilities that were there. So the defendant responded out of a very commendable concern to a situation [379] that he became acquainted with. I commend him for it. He responded and then said: "Turn around, take me back and I will show you where the weapon is.

It was a waiver, clearly, and on the basis of the evidence that I have heard, and intelligent waiver, of his right to remain silent. And for whatever reason, whatever motivates people, as long as it is not the result of threat or coercion, it is a waiver for all purposes, and the weapon was found.

I find that the seizure of this weapon by the authorities, on the basis of the evidence that I have heard and that I believe, and the inferences that I draw from it, in no way violated the defendant's constitutional rights.

The defendant's oral motion to suppress this weapon that has been marked as State's 41, is denied. The defendant's exception is noted.

MR. STONE: Is the Court ready for Mr. Aubin?

THE COURT: Yes. I would also state for the record, the Court distinguishes the Massey case in that the situation there was entirely different. The counsel had requested by name, had responded by telephone, had spoken both to the defendant and to the police, and I [380] found in that case that a waiver had to be in the presence of counsel because that counsel had all but entered an appearance in the case. The case of People against Arthur, I also distinguish, because in that case counsel had appeared; not just a call for counsel. So that, I distinguish both of those cases.

* * * * * * * * *

[385] Q Describe what it looked like?

A It was a sawed-off shotgun.

Q Okay. Sawed-off shotgun?

A Yes, it was.

Q Is there a distinction in your mind between a rifle and a shotgun?

A Yes, it is.

Q What did you observe?

A Well, he told me that — well, I heard the noise first, metal noise, and he said: "I've got a shotgun." I turned and I seen the shotgun.

Q And what happened then?

A He told me not to pull any funny business, or try to be a hero, or anything, and I just told him that, you know, I wouldn't pull anything funny. I'd just go along with him.

Q Showing you State's Exhibit 41 for Identification, does this weapon look similar in nature to the one that you observed on the night of January 16, 1975, in your Standard Cab?

MR. CERILLI: Objection to the form of the question, your Honor.

THE COURT: Overruled. You may answer.

A The only thing I seen was the barrel. It was — he was . . .

* * * * * * * * *

[389] in and then I proceeded. Then it was at some shopping center — I think it was Benny's Auto Store — in Cumberland that he said to turn around and head back towards — he wanted to go back towards Providence.

Q When he got in the front seat, could you still see the shotgun?

A Yes, I did. That's the first thing that came into the car.

Q The first thing that came into the car?

A Hmmm, hmmm.

Q And it was a sawed-off shotgun?

A Yes, it was.

Q What happened then after you turned around in Benny's in Cumberland?

A We went through Manville and onto 146, and he told me to take left, go to Providence, and up to the Admiral Street exit. That's where he told me to get off. And from then on, he gave me directions where he wanted to go.

Q And then what happened?

A We just drove. I don't know just where it was but through the streets, and I don't know just where it was, somewhere in North Providence, but I do remember going through the Rhode Island Junior College Campus.

Q Is is Rhode Island Junior College or Rhode Island College?

[390] A Rhode Island College. RIC. And it was shortly thereafter that he told me to drive into a lot and where he got out.

Q Did you ever see a golf course anywhere?

MR. CERILLI: Objection.

THE COURT: Leading. Sustained.

Q What all did you observe in the Rhode Island College area?

A We just went through the parking lot. I had been there last year one time. We just drove through the streets there. I didn't observe anything else.

Q Are you familiar with that general area?

A No, I'm not.

Q And then what happened?

A Well, I dropped him off. He told me to drive into this parking lot, and he said stop the car, and he said: "I'm getting out now." He said: "Don't stop until you get to Woonsocket."

Q Now, how much time transpired between the time you originally picked this individual up on Diamond Hill Road, Child's World until you stopped in the parking lot you just described?

A I believe I dropped him off it was quarter to twelve.

Q So approximately an hour and forty-five minutes?

A Yes.

Q And he was driving around all this time with the shotgun [391] on you?

A Yes.

Q And what happened after he got out of the car?

A I just drove away.

Q And what did you do after you drove away?

A The first phone booth I seen I called the Providence Police.

Q Where did you get the money from to call the Providence Police?

A I had some change in my pocket, a few dimes.

Q And after you called the Providence Police, what happened next?

A A cruiser responded and I told them what had happened, and they asked me to follow them to the Providence Police Station, which I did.

Q And when you got to the Providence Police Station, what happened?

A I talked to some more officers about what had happened and then they asked me to give my statement to the detectives, and they brought me to the detective's room.

Q Did you observe anything?

MR. CERILLI: Objection, your Honor.

THE COURT: Overruled. You may answer.

A On the way to —

Q Just simply yes or no.

[392] A Yes, I did.

Q Did you observe anything?

A Yes, I did.

Q What did you observe?

A A bulletin board that had several pictures on it, and I identified the person.

Q Now, had the police directed you to that bulletin board at that time?

A No, they didn't. We were just walking by there. It was in some hallway.

Q And you looked at the bulletin board on your own?

A Yes, I just happened to glance by.

Q What did you observe when you saw that bulletin board?

A I seen the defendant.

Q The same individual that you described earlier?

A Yes, I did.

Q And what did you say about that photograph?

A I just said that that's the guy that just held me up. I was surprised that the picture was there.

Q And after that, what did you do?

A I gave the statement to the detectives, and then they produced a half dozen pictures, and they asked me if it was one of them, and I again picked out the same individual.

[393] Q It was the same individual you'd seen on the bulletin board?

A Yes, it was.

Q It was the same individual that had robbed you?

A Yes, it was.

Q Then what happened either later on that night or the next morning?

A The next morning I received a call from the Providence Police saying that they had captured someone, and they wanted me to come down sometime in the morning, if I could, to view the lineup.

Q How many people were in the lineup?

MR. CERILLI: Your Honor, if the Court please, before any evidence of a lineup, I'd like to have an opportunity for a voir dire as to how the lineup was conducted and so forth.

MR. STONE: Your Honor, I assume that he would have that opportunity since we don't have the jury here.

MR. CERILLI: I'd have to speak with the police officers who set the lineup; I'd have to make sure he waived his right to counsel at the lineup, and so forth. I believe the Court understands my position.

THE COURT: I understand your position but I am going to handle things somewhat out of the normal order.

* * * * * * * * *

[409] MR. CERILLI: Objection, your Honor.

THE COURT: Objection overruled. You may answer.

A Could you repeat the question?

Q From your experience with weapons, did you have any idea what this weapon could be used for?

A Only through what I've seen on television.

Q Well —

MR. CERILLI: Objection, your Honor. Motion to strike.

MR. STONE: I won't go any further.

THE COURT: The question was premised on your experience with guns, so the objection is sustained. Proceed to your next line of questioning.

Q Now, showing you State's Exhibit 41 for Identification, can you identify this particular weapon?

A That is the weapon I saw on Monday the 13th.

Q How can you so identify that weapon?

A By the marks on the barreling.

Q By the marks on the barreling?

A Yes, on the outside.

Q Is this the one you saw on the morning of the 13th?

A Yes.

Q Who showed you that weapon?

A Thomas Innis.

* * * * * * * * * *

[441] To admit this evidence would be to supply by inference what happened to Mulvaney because we know what happened to Aubin. I submit that the type of case that would permit the introduction of this kind of evidence is when you have two complete s[c]enarios, and we do not have them in this case.

I am convinced after much thought that it would be prejudicial and reversible error for the Court to admit this kind of evidence in this proceeding. The State's motion to present the testimony of Mr. Aubin is denied. The defendant's objection to the motion is sustained. Whoever has the exception, may have the exception.

MR. STONE: The State would take an exception.

THE COURT: Very well. Are you ready to call your next witness?

MR. STONE: Yes, your Honor.

THE COURT: All right, bring the jury out, please.

MR. CERILLI: Your Honor, may I approach the bench with Mr. Stone?

THE COURT: Yes.

(Bench conference)

(Jury enters)

* * * * * * * * * *

TESTIMONY OF ROBERT M. LOVELL

Direct Examination by Mr. Stone.

[445] Q After Captain Leyden arrived and advised him of his rights, what happened then?

A Captain talked to him for a minute, then a wagon arrived and he placed him in a wagon.

Q And do you know if anything happened subsequent to him being placed in the wagon, of your own personal knowledge?

A Well, all I know is that the wagon left, then the men in the wagon, I don't know who it was, came back on the air, stated the subject wanted to show us where a gun was and they then returned back to where we were.

Q Subsequent to the wagon returning, were you directed to any particular location?

A Yes, sir, Obadiah Brown Road.

Q Who were you directed there by?

A Thomas Innis.

Q The same Thomas Innis that you identified in this courtroom?

A Yes, sir.

Q Under his direction, what did you find?

A We found a .16 gauge bolt action sawed-off shotgun, and eight shells.

Q Would you be able to identify it if you saw it again?

A Yes, sir.

* * * * * * * * *

TESTIMONY OF JOSEPH GLECKMAN.

Cross-Examination by Mr. Cerilli.

[455] A Well, we started to transport this party down. We made it about a mile down the road. We went down Chalkstone Avenue and proceeded towards Manton Avenue, down the road, and at this particular time I was talking to Patrolman McKenna and I was stating to him that this is such a bad location for a weapon to be left, with shells, as Obadiah Brown Road is the location of a school for the retarded, or you know, children who have mishaps, and that if one of the child should come across this weapon they could hurt themselves.

Q Did anything happen after you said that to Officer McKenna?

A At this particular time, the subject in the back seat stated: "Stop the car, turn around, I'll show you where the weapon is."

Q Do you see the subject in the courtroom?

A Yes, I do.

Q Could you point to him, please?

A (Pointed).

Q What does he have on?

A Dungaree jacket with a print shirt, tan with dark brown.

Q That's the subject that was in the wagon?

A The back seat.

[456] Q After he said: "Turn around, I'll show you where the weapon is", what happened then?

A Well, Patrolman McKenna got on the portable, and the mike, and he said — told the captain that the subject had stated he would show us where the weapon is, we went back to where he said it would be, on Obadiah Brown Road, and at this time we was met by Captain Leyden again who administered his rights to him again at this time.

Q What did he say at that time?

A He said: "You have the right to remain silent; anything you say can and will be used against you in a court of law; you have the right to an attorney being present while you're questioned, and if you can't afford one, the State will appoint you one; and do you understand this?" And he said yes, and proceeded to show us.

Q And, one question, while you were — when you first arrived at the scene and when you got back, were there any other police officers in the area?

A Numerous police officers conducting a search.

Q What were they doing?

A Conducting a search for a shotgun.

Q After you returned, did Mr. Innis help in the search?

[457] A Yes, he did.

Q Were you present?

A Yes, I was.

Q And what did Mr. Innis do?

A Well, he took — well, he was handcuffed at this time and I was holding onto him, and he was showing us, "Well, it might be over here, I'm not sure." Then he took us to another location. It was under this rock, and about five, six feet away, a little embankment, there was the shells.

Q And did you recover a shotgun?

A Yes, we did.

Q Can you describe what that shotgun looked like, if you recall?

A It was a sawed-off type shotgun, approximately .16 gauge.

Q Showing you State's Exhibit 42-41 full, do you recognize this shotgun?

A Yes, this is the one.

Q And how do you so recognize that shotgun?

A Well, it's got Patrolman Lovell's signature on it.

Q Did you see him put his signature on it that night?

A Yes, I did.

* * * * * * * * *

Redirect Examination by Mr. Stone.

[461] A Yes.

Q When you returned in the wagon?

A Yes, I was.

Q And you say you also heard Captain Leyden ask him if he understood his rights?

A Yes, I did.

Q What did the defendant respond?

A This is the second time he said he would show us.

MR. STONE: I have no further questions.

MR. CERILLI: I have no further questions.

THE COURT: You may step down, sir. Thank you.

MR. STONE: Your Honor, at this time the State would call Corporal Green, Rhode Island State Police, to the stand.

* * * * * * * * *

[537] to examine the evidence with regard to the major charges involved. Proceed. Your exception is noted.

MR. CERILLI: Thank you, your Honor. The only other objections would be to the requests that had been made in the defendant's request to charge but not charged.

THE COURT: Very well.

MR. STONE: In response to the objection, the State would state for the record — particularly note to the murder charge — that not only is it inconsistent with second degree, manslaughter, but just looking at the location of the shot, the testimony of Doctor Faye Spruill that this had to be first degree

murder, the location of the body, no clothes, all this inconsistent with anything other than premeditation, assuming that they didn't even believe a felony occurred. The charges aren't given in a vacuum but they relate to the facts as brought out by the trial.

THE COURT: Well, this was the Court's feeling after carefully examining the evidence. The defendant's exception is noted. We will be in recess until we have some word from the jury.

(Recess)

AFTERNOON SESSION

(Defendant enters)

* * * * * * * * *

[539] THE COURT: Very well.

(Jury polled)

(Jury excused)

THE COURT: Mr. Cerilli, will there be a motion for a new trial?

MR. CERILLI: Yes, Your Honor.

THE COURT: All right. I will set it down for hearing November 25th, before me, in this court. We will be in recess.

* * * * * * * * *

[546] Normally, the Court would continue this case for sentencing and order the preparation of a presentence report, however, since this Court has no discretion in the sentence to

be imposed on the charge of murder in the first degree, and consistent with the holding of the Supreme Court in the case of State against Bradshaw, 101 R.I. 233, I will now impose sentence on the defendant in these cases.

(Arguments presented by counsel)

THE COURT: Mr. Innis, the law gives you the right to say anything you wish to the Court at this point before sentence is imposed. You may say anything at all, and nothing you say would in any way work to your disadvantage. Is there anything you wish to say to the Court?

DEFENDANT: Nothing at all, your Honor.

THE COURT: Nothing at all?

DEFENDANT: No.

THE COURT: Very well. I have before me all presentence information that had previously been prepared by the Department of Probation and Parole, the Presentence Division, with regard to this defendant. It is material that dates from the middle 1960s until 1974. I have reviewed that in deliberating on what sentences would be imposed on those charges wherein the Court has discretion. The defendant [547] has a long history of anti-social behavior. The defendant also took great pains in one sense to cover up his involvement in this particular crime by stripping the body and so forth, in my opinion, but then did some very unintelligent things, presenting himself at various homes in the area. One wonders. In any event, I do not consider this a crime of impulse. I am persuaded by the evidence that I have heard and reviewed that the defendant's intention to kill the cab driver was more than momentary.

I commend the defendant, and I will give him credit, for bringing the Providence Police to where he had secreted the weapon. It was in an area, according to the evidence, where there was a school for retarded children. Had it been found, a

terrible tragedy could have occurred, and I will give you credit for that, for that humanity that you showed immediately on hearing this, bringing the police to where the weapon was. But nothing that I have heard and read of your background and record, nothing in the presentence report, indicates to me anything but that long sentences should be imposed. You did not have the best of beginnings, Mr. Innis, but you have been given many breaks along the way, and it is time for society to say enough; no more. Society is entitled to some protection. Therefore, on the charge of kidnapping, the Court sentences you to twenty years [548] at the Adult Correctional Institutions. On the charge of robbery, in which you have been found guilty, the Court sentences you to thirty years at the Adult Correctional Institutions. On the charge of murder in the first degree, I sentence you to life imprisonment at the Adult Correctional Institutions.

I must advise you now, Mr. Innis, that you have the right to appeal your guilty findings or the sentences of this Court to the Supreme Court of the State of Rhode Island. If you are unable to afford private counsel to handle this, you will have the services of the public defender's office to prosecute that appeal in your behalf, or you may proceed in forma pauperis, if you so desire, for any reason the public defender's office cannot represent you.

MR. STONE: Excuse me, your Honor, are those sentences concurrent with the sentences presently being served?

THE COURT: Yes. Each of those sentences are to be served concurrent with each other and concurrent with any sentences presently being served. That is all.

[The Opinion of the Supreme Court of Rhode Island may be found in the Appendix to the Petition for Writ of Certiorari at pages 1a-29a.]

In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-1076.

STATE OF RHODE ISLAND,
PETITIONER,

v.

THOMAS J. INNIS,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND.

Response in Opposition to Petition for Writ of Certiorari.

WILLIAM F. REILLY,
Public Defender,
BARBARA HURST,
Chief Appellate Attorney,
JOHN A. MACFADYEN III,
Assistant Public Defender,
Appellate Division,
Office of the Public Defender,
250 Benefit Street,
Providence, Rhode Island 02903.

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

Table of Contents.

Table of Authorities Cited.

CASES.

CONSTITUTIONAL PROVISIONS.

In the Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-1076.

STATE OF RHODE ISLAND,
PETITIONER,

v.

THOMAS J. INNIS,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND.

Response in Opposition to Petition for Writ of Certiorari.

Opinion Below.

The opinion of the Supreme Court of Rhode Island is reported as *State* v. *Innis*, 391 A. 2d 1158 (R.I. 1978), and is reprinted in the appendix (pp. 1a-29a) to the petition for certiorari.

Jurisdiction.

The respondent agrees with the statement of jurisdiction as it appears in the petition for certiorari.

Question Presented.

Whether as a matter of fact the Providence police deliberately attempted to elicit incriminating information from the respondent after he had requested to see a lawyer and whether, having requested assistance of counsel, the respondent waived his constitutional protections prior to divulging the information later used against him at trial.

Constitutional Provisions Involved.

The respondent agrees with the denotation of constitutional provisions appearing in the petition for certiorari (the Fifth and Fourteenth Amendments to the Constitution of the United States).

Statement of the Case.

The respondent agrees with the statement of prior proceedings as reported in the petition for certiorari.

Statement of Facts.

At 4:30 in the morning, on January 17, 1975, the respondent, Thomas J. Innis, was arrested and handcuffed by the Providence police. After being three times advised of his *Miranda* rights, and at least once stating that he understood these rights, Mr. Innis requested to see an attorney. Captain Leyden of the Providence police then ordered three of his subordinates, Officers Gleckman, McKenna, and Williams, to place the respondent in the rear of a caged four-door sedan and to take him to the Central Station. He further directed these officers not to question Mr. Innis or to intimidate or coerce him in any way.

The three officers disagreed in their testimony as to whether Officer Gleckman drove the vehicle or whether he was in the back seat with the respondent. Whatever the seating arrangements, it is undisputed that, at some point during the rapidly aborted ride to the Central Station, Officer Gleckman made a number of remarks, allegedly addressed to Officer McKenna, which he summarized as follows:

> A. At this point, I was talking back and forth with Patrolman McKenna stating that I frequent this area while on patrol and there's a lot of handicapped children running around in this area, and God forbid one of them might find a weapon with shells and they might hurt themselves.

His brother officers expanded on some of the details of Officer Gleckman's statements and their responses. Officer McKenna indicated that he answered Gleckman with something to the effect that,

> we should, you know, continue to search for the weapon and try to find it.

Officer Williams remembered Gleckman as saying,

> It would be too bad if the little — I believe he said a girl — would pick up the gun, maybe kill herself.

The respondent heard all of the remarks summarized in the above testimony. While the precise language and extent of Officer Gleckman's comments cannot be gleaned from the record, all three officers stated that no direct questions were addressed to Mr. Innis and that they had traveled a little less than a mile when the respondent burst out with,

> Stop the car. Turn around and I'll show you where the gun is.

Mr. Innis did not testify at all.

On returning to the scene of the arrest, Captain Leyden again gave the respondent his *Miranda* warnings, and Mr. Innis agreed to lead the officers to the shotgun. Concluding that the "real issue [was], did this defendant have the benefit of his *Miranda* Warnings [*sic*]" (Pet. App. 33a), the trial justice found that Mr. Innis had been advised of his rights and that he had waived them. The State was then permitted to introduce into evidence the shotgun, the statement and police testimony regarding the circumstances of its finding. Following his conviction for robbery, kidnapping and felony murder, the respondent appealed to the Supreme Court of Rhode Island.

On appeal Mr. Innis raised seven issues, five of which were not reached by the court, including a claim that the motion to suppress should have been granted under R.I. Const. Art. I, § 13. Instead, relying primarily on *Miranda* v. *Arizona*, 384

U.S. 436 (1966), and a number of Rhode Island decisions construing that opinion, the court concluded that Officer Gleckman impermissibly attempted to elicit incriminating information from the respondent immediately after Mr. Innis had invoked his right to counsel, that the respondent's inculpatory response was the product of "subtle compulsion," and that discovery of the shotgun was the direct fruit of these illegal endeavors. The court held that the shotgun and the statement leading to its discovery were improperly admitted; it sustained the respondent's appeal on this ground and remanded the case for a new trial.

Reasons for Not Granting the Writ.

The respondent argues the following reasons why the writ of certiorari should not be issued:

1. The point of dispute between the petitioner and the Supreme Court of Rhode Island is one of fact and not one of federal constitutional law.

2. The state Supreme Court's decision is not in conflict with federal cases or those from other state jurisdictions; moreover, the petition does not indicate that the lower federal courts or the state courts are having difficulty applying the pronouncements of this Court to similar cases.

3. The decision of the Supreme Court of Rhode Island is based on a routine rendition of the standards laid down in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and *Michigan* v. *Mosley*, 423 U.S. 96 (1975).

I. The Petition for Writ of Certiorari is Premised upon a Factual Contention which was Rejected by a Majority of the Supreme Court of Rhode Island.

The principal issue in this case is factual and not legal in nature. The State of Rhode Island argues to this court, just as it argued to the State Supreme Court, that Officer Gleckman's comments were but casual conversation not intended for the respondent's ears. Mr. Innis contends, as he has always contended, that Officer Gleckman's comments were a deliberate attempt to elicit incriminating information from an exhausted suspect, arrested at 4:30 in the morning and confined in a small space with three of his captors. On the record below, which contained no more than a synopsis of the interchange between the three officers, the factual question presented to the Supreme Court of Rhode Island was admittedly a difficult one. It was resolved, however, against the State with a majority finding that Thomas Innis unearthed the shotgun as a result of "subtle compulsion" engendered by remarks deliberately calculated to produce an inculpatory response. *State* v. *Innis*, *supra*, at 1162, 1163 (Pet. App. 7a, 9a). Two justices dissented, not because they disagreed with the majority's statement of law, but because they could not accept its reading of the facts.

The petitioner nevertheless characterizes the decision below as holding that a police officer's innocent observation, overheard by a suspect in custody who has requested the assistance of counsel, renders inadmissible a later voluntary act of self-incrimination (Pet., p. 8). Moreover, despite four pages in the majority opinion discussing the question whether in fact the respondent waived his constitutional protections and ultimately concluding that he did not, the petitioner nevertheless claims that the court precluded waiver as a matter of federal constitutional law (Pet., p. 8) and even that it

mandated suppression "in spite of [an] affirmative waiver of these rights" (Pet., p. 10). Only by thus replacing the majority's findings of fact with its own view of what happened on January 17, 1975, can the petitioner suggest to this Court that Rhode Island has adopted a *per se* rule of exclusion once a suspect invokes his constitutional protections. Nowhere does the majority opinion suggest that an innocent remark by a police officer constitutes impermissible interrogation, but only that Officer Gleckman's remarks were not innocent. Nowhere does the majority hold that the respondent could not have waived his constitutional protections, but only that he did not.

II. The Decision of the Supreme Court of Rhode Island has Not been Shown to Conflict with Holdings of Other State Courts or of the Lower Federal Courts and this Court's Further Guidance in this Area is Not Required.

The petition alleges that the holding of *State* v. *Innis*, 391 A. 2d 1158 (R.I. 1978), is in conflict with other state and federal decisions (Pet., p. 7). The petitioner cites no other state or lower federal court cases in support of this assertion. There is no reason to believe that state courts or lower federal courts are having difficulty applying the teachings of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and *Michigan* v. *Mosley*, 423 U.S. 96 (1975), to various fact situations or that they require this Court's intercession to resolve disputes of law. Further, there are no disputes of law involved in this case, as it called only for the application of settled principles in a somewhat unusual factual context which is unlikely to arise again. Only by mischaracterizing the decision of the State Supreme Court can the petitioner demonstrate a misapplication of this Court's prior decisions to the *Innis* facts: As explained *infra*, the State Supreme Court did not even intimate that a suspect in Innis'

circumstances could not waive his Fifth Amendment privilege after invoking a right to counsel; the court expressly and clearly found only that the facts as adduced at trial did not sustain the government's burden of proving waiver in this particular case. The standard used to determine waiver was correct and does not conflict with decisions of this Court or of other courts.

III. The Supreme Court of Rhode Island Applied Settled Principles of Federal Constitutional Law to the Facts as it Found Them.

Once it is accepted that Officer Gleckman deliberately elicited an inculpatory response from the respondent, the decision below becomes nothing more than a routine application of the principles enunciated in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and later refined in *Michigan* v. *Mosley*, 423 U.S. 96 (1975). *Miranda* holds that:

> If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.
>
> . . . . . .
>
> If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.

Miranda v. *Arizona*, *supra*, at 474-475. "Interrogation" within the meaning of *Miranda* cannot be limited to sentences addressed to the suspect which end with question marks. The

term clearly encompasses any deliberate verbal attempt to elicit incriminating information by identifiable law enforcement officers. *Brewer* v. *Williams*, 430 U.S. 387 (1977). Where Officer Gleckman began his calculated remarks within minutes of the respondent's invocation of his right to counsel, in no sense did the police "scrupulously honor" his constitutional protections as is required by *Michigan* v. *Mosley*, 423 U.S. 96, 104 (1975). Moreover, *Miranda* and *Mosley* aside, the Supreme Court of Rhode Island concluded as a matter of fact that the defendant's inculpatory behavior was not voluntary, but rather was subtly compelled by Officer Gleckman's comments. *Blackburn* v. *Alabama*, 361 U.S. 199, 206 (1960).

Nor, as the petitioner argues, did the Supreme Court of Rhode Island hold that the respondent could not waive his rights having once invoked them. It held only that on the facts of the instant case the State had not satisfied its heavy burden of establishing a waiver of a fundamental constitutional right. *Miranda* v. *Arizona*, *supra*, at 444; *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938).

In sum, nothing in the opinion suggests a deviation from or an expansion of any federal constitutional standard. The Supreme Court of Rhode Island merely applied settled principles of law to a factual predicate with which the State continues to disagree.

As to suppression of the shotgun, the assertion by the petitioner that this Court has never condoned "extension" of the rationale of *Wong Sun* v. *United States*, 371 U.S. 471 (1963), to a Fifth Amendment case to exclude derivative evidence is incorrect and reveals a misunderstanding of this Court's pronouncements. This Court has applied a "fruits" exclusionary rule to evidence obtained through exploitation of an unlawful confession, *Harrison* v. *United States*, 392 U.S. 219, 222, 226 (1968), and has recently reaffirmed the theoretical appro-

priateness of this doctrine in a Fifth Amendment context. *Michigan* v. *Tucker*, 417 U.S. 433, 447 (1974) ("In a proper case this rationale [deterrence of improper police conduct by exclusion of derivative evidence] would seem applicable to the Fifth Amendment context as well."). See *Massachusetts* v. *White*, ____ U.S. ____, 58 L. Ed. 2d 519 (1978), reh. den. ____ U.S. ____ (No. 77-1388, January 22, 1979). The State's reliance on the holding of *Michigan* v. *Tucker, supra,* is misplaced; the case at bar does not involve good faith police action with an "inadvertent disregard" of the prophylactic warnings required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), but rather police remarks constituting a "highly improper" subjection of the respondent to "subtle compulsion." *State* v. *Innis, supra* at 1163, 1162 (Pet. App. 9a, 7a). Unlike the situation in *Michigan* v. *Tucker, supra,*

> [t]his is not a case where a defendant voluntarily confesses to a crime or admits to incriminating evidence on his own.

State v. *Innis, supra* at 1163 (Pet. App 9a).

Finally, this case is different from most others in that the "derivative" evidence was the precise object of the improper police questioning; the inculpatory admission was only the respondent's offer to lead them to the weapon. The shotgun was thus more of a primary product of the illegal interrogation than an incidental, unanticipated result of a full confession.

Conclusion.

For the reasons stated above, the petition for writ of certiorari should not be granted.

Respectfully submitted,

WILLIAM F. REILLY,
Public Defender,
BARBARA HURST,
Chief Appellate Attorney,
JOHN A. MacFADYEN III,
Assistant Public Defender,
Appellate Division,
Office of the Public Defender,
250 Benefit Street,
Providence, Rhode Island 02903.

In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-1076.

STATE OF RHODE ISLAND,
PETITIONER,

v.

THOMAS J. INNIS,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND.

Brief for the Petitioner.

DENNIS J. ROBERTS II,
Attorney General,
NANCY MARKS RAHMES,
Special Assistant Attorney General,
Chief, Criminal Appellate Division,
Providence County Courthouse,
Providence, Rhode Island 02903.

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

Table of Contents.

Table of Authorities Cited.

Cases.

CONSTITUTIONAL AND STATUTORY PROVISIONS.

OTHER AUTHORITIES.

In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-1076.

STATE OF RHODE ISLAND,
PETITIONER,

v.

THOMAS J. INNIS,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND.

Brief for the Petitioner.

Opinion Below.

The opinion of the Supreme Court of Rhode Island is reported at 391 A. 2d 1158 (1978) (Pet. App. 1a-29a).

Jurisdiction.

The decision of the Supreme Court of Rhode Island was entered on August 9, 1978 (Pet. App. 1a). A motion for leave to petition for reargument out of time was denied by the Supreme Court of Rhode Island on December 21, 1978. This Court granted two extensions of time in which to petition for a writ of certiorari, thereby extending the time in which to file the petition to and including January 6, 1979. The petition for writ of certiorari was filed on January 5, 1979, and was granted on February 26, 1979. Two extensions of time in which to file the brief of the petitioner on the merits and the appendix were granted, thereby extending the time in which to file the brief and appendix to and including May 21, 1979. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

Question Presented.

Whether the Supreme Court of Rhode Island used the correct federal constitutional standards in excluding a shotgun from evidence after concluding there was an improper interrogation and no intelligent waiver under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), where an arrested suspect, minutes after receiving and asserting his *Miranda* rights, volunteered to help police recover the shotgun upon overhearing a conversation between two patrolmen to the effect that the shotgun was probably hidden near an area school, and, in fact, helped recover the shotgun after once more receiving but then relinquishing his *Miranda* rights.

Constitutional Provisions Involved.

Fifth Amendment.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment.

Section 1. ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .."

Statement of the Case.

Prior Proceedings.

On November 12, 1975, after a jury trial, Thomas J. Innis was found guilty of kidnapping, robbery, and murder in the first degree, in violation of R.I. G.L. (1969 Reenactment) §§ 11-26-1, 11-39-1, 11-23-1, respectively.

Prior to the impanelling of the jury, defense counsel made an oral motion to suppress a shotgun which had been found by the police with the respondent's assistance at the time of arrest (A. 3-4). The trial judge and counsel agreed to conduct the suppression hearing at the appropriate time during the trial (A. 5). When the State offered to introduce the shotgun into evidence, the jury was sent out and a *voir dire* was conducted (A. 8-10).

At the conclusion of the *voir dire* (A. 11-61), the trial judge made findings of fact and conclusions of law (A. 62-63). The court denied the respondent's oral motion to suppress the shotgun (A. 63). The respondent's exception was noted (A. 63).

On appeal, the Supreme Court of Rhode Island reversed and set aside the trial judge's ruling on the admissibility of the shotgun. *State of Rhode Island* v. *Thomas J. Innis*, ____ R.I. ____, 391 A. 2d 1158 (1978) (Pet. App. 1a-29a). The case was remanded to the lower court for a new trial.

Statement of Facts.

On January 16, 1975, the body of John Mulvaney, a cab driver, was found in a shallow grave in Coventry, Rhode Island (A. 5-6). The cab company dispatcher had last heard from Mulvaney at approximately 10:25 P.M. on January 12, 1975 (A. 7). Death had resulted from a shotgun blast to the back of the head (A. 6-7). The facts as elicited during the trial and the *voir dire* (A. 11-63) may be summarized as follows.

On January 16, 1975, shortly after midnight, the Providence police received a phone call from a cab driver, Gerald

Aubin,[1] who reported that he had been robbed by a man carrying a sawed-off shotgun and that he had dropped off this person in the vicinity of Rhode Island College[2] (A. 64-66). A police cruiser responded and Mr. Aubin was asked to follow the car to the Providence police station (A. 66). While Mr. Aubin was in the Providence police station waiting to give his statement, he happened to observe his assailant's, the respondent's, picture on a bulletin board (A. 66-67). He told this to a police officer. After giving his statement, Mr. Aubin picked the same individual's photograph out of a group of six photographs (A. 67-68). Shortly thereafter, the Providence police began a search of the Mount Pleasant area (A. 12, 42).

At approximately 4:30 A.M. on January 17, 1975, Patrolman Lovell apprehended the respondent, placed him under arrest, searched for weapons, and advised him of his *Miranda* rights (A. 12-14, 17-18, 27). Within minutes, Sergeant Sears arrived at the scene and again advised Innis of his constitutional rights under *Miranda* (A. 19, 28-29). Immediately thereafter, Captain Leyden arrived and also advised Innis of his *Miranda* rights (A. 20-21, 34-36). In response to the captain's warnings, the respondent stated that he understood these rights and that he wanted an attorney (A. 35). The captain then directed three officers, Patrolmen Gleckman, McKenna, and Williams, to place the respondent in the rear of a caged four-door sedan and transport him to the Central Station (A. 35). They were also instructed by the captain not to question Innis or to in-

[1] This testimony was elicited during a *voir dire* examination of Mr. Aubin. This *voir dire* was conducted after the trial judge had ruled on the admissibility of the shotgun. The trial court refused to allow the introduction of this testimony, concluding it was prejudicial "other crimes" evidence (A. 69).

[2] Rhode Island College is located in an area of Providence commonly referred to as Mount Pleasant.

timidate or coerce him in any way (A. 46). Two of the officers sat in front; one sat in the back with Innis (A. 43, 50, 58).

While en route to the Central Station, Patrolman Gleckman, who had been on the force for only two years, began a conversation with Patrolman McKenna (A. 41, 43-44). The respondent could hear this conversation (A. 46). Patrolman Gleckman stated:

> "A At this point, I was talking back and forth with Patrolman McKenna stating that I frequent this area while on patrol and there's a lot of handicapped children running around in this area, and God forbid one of them might find a weapon with shells and they might hurt themselves.
>
> "Q Who were you talking to?
>
> "A Patrolman McKenna.
>
> "Q Did you say anything to the suspect Innis?
>
> "A No, I didn't.
>
> "Q Did he say anything to you prior to this?
>
> "A At this point he stated 'stop'.
>
> "Q No. My question, prior to your saying that, had the defendant said anything?
>
> "A No.
>
> "Q Had anybody said anything to him?
>
> "A No.
>
> "Q And you were talking to Patrolman McKenna?
>
> "A Right.
>
> "Q And what happened next?
>
> "A At that point, as I was saying, there is kids running around there, as it is a handicapped school, and he says, you know, back and forth with Patrolman McKenna, he at this point said: 'Stop, turn around, I'll show you where it is.' At this point, Patrolman McKenna got on the mike and told the captain: 'We're returning to the scene of the crime, or where the weapon might be, and the subject is going to show us where it will be.'" (A. 43-44).

Patrolman McKenna radioed Captain Leyden and informed him that they were returning to the scene of the arrest to locate the weapon (A. 44, 50, 59). The car had traveled less than a mile at the time of this statement and they returned to the arrest scene at Obadiah Brown Road within minutes of leaving (A. 22-23, 38).

The other two officers corroborated this sequence of events and the general scope of their "conversation," disagreeing only on the question of where each officer was seated in the car (A. 43, 46, 49-50, 52-53, 58-59). All three testified that no one spoke to or with Innis (A. 44, 46, 53-54, 58-59).

Upon returning to the scene, Innis alighted from the car and Captain Leyden again advised him of his *Miranda* rights (A. 36, 38-39). Innis replied that he understood those rights but wanted to show them where the gun was because of the school that was in the area and the "small kids around" (A. 36, 39). He was placed back in the car and they all proceeded to a nearby field (A. 39-40). The respondent at first had trouble finding the weapon, finally locating it under some rocks along the side of Obadiah Brown Road (A. 14-15, 23-24, 30).

The respondent elected not to testify at the *voir dire* and did not dispute these facts either at the trial or on appeal (A. 61). The trial judge found that the respondent had been "repeatedly and completely advised of his Miranda rights," and that his offer to locate the gun constituted a waiver (A. 62-63). The respondent's motion to suppress the gun was denied (A. 63).

The trial proceeded and exhibit 41, the gun, was identified by one witness as having been in Innis' possession on the morning of January 13, 1975 (A. 68). Other witnesses had

previously testified that they had seen Innis on the night of January 12 with a shotgun. Patrolman Lovell identified exhibit 41 as the shotgun he found on Obadiah Brown Road pursuant to the respondent's direction (A. 70). Patrolman Gleckman testified in relevant part that Innis said, "Turn around, I'll show you where the weapon is," that upon their return Captain Leyden again administered "his rights," to which Innis responded that he understood and would show the police where the gun was, and that he did in fact direct the police to its location (A. 71-73). The respondent was found guilty by the jury of murder, kidnapping, and robbery. The respondent then appealed to the Supreme Court of Rhode Island.

On appeal the Supreme Court, with two of the five justices dissenting (Pet. App. 18a-29a), concluded that the shotgun and admissions should have been excluded from evidence and reversed the conviction. Seven issues had been raised on appeal but the ruling was based solely upon two of those issues (Pet. App. 2a).[3] The majority found that the respondent had exercised his *Miranda* right to counsel and that Patrolman Gleckman's statement constituted interrogation without a valid waiver from Innis of his *Miranda* rights. The court also concluded that, irrespective of the fourth set of warnings given by Captain Leyden, the seizure of the gun was the product of the improper remarks of Patrolman Gleckman and should have been suppressed as "fruit of the poisonous tree." *State of Rhode Island* v. *Thomas J. Innis*, ____ R.I. ____, 391 A. 2d 1158 (1978) (Pet. App. 1a-29a).

[3]The State Supreme Court also ruled that a defendant may not be convicted of both murder in the first degree under a felony murder theory and the underlying felony. The State did not seek review of this holding.

Summary of Argument.

This case involves the admissibility of statements made by the respondent after overhearing a conversation between two police officers, while he was lawfully in custody but subsequent to his having been advised of his rights as prescribed in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and requesting counsel. It further involves the admissibility of physical evidence which was located by the police under the respondent's direction, subsequent to his statements but after he had once more been advised of his rights under *Miranda* v. *Arizona*, *supra*, and had orally acknowledged that he understood. The lower court held that the statement must be excluded because the respondent had been interrogated within the meaning of that concept as it had been expanded by the decision in *Brewer* v. *Williams*, 430 U.S. 387 (1977), in the absence of an affirmative waiver of his *Miranda* rights. The court then went on to hold that the respondent's subsequent offer of assistance and the physical evidence which he located for the police were the "fruit" of unlawful interrogation and should also have been suppressed at trial.

This case raises three analytically distinct but interrelated issues: the first concerns the precise meaning of interrogation which triggers the applicability of *Miranda* v. *Arizona*, *supra*; the second issue, in connection with which it is assumed the respondent was improperly interrogated, concerns the existence of a subsequent valid waiver of *Miranda* rights; and the third issue, in connection with which it is assumed the respondent was improperly interrogated and did not execute a valid waiver, is whether such a violation (transgression) must result not only in a per se exclusion of the initial statement but of the fruits as well.

I. The dominant issue in this case concerns the linchpin of *Miranda*, *supra*, custodial interrogation. There is no question

that the respondent was in custody. The only issue concerned whether he was interrogated after invoking his *Miranda* rights. Under *Miranda*, there is no interrogation where law enforcement officers do not by word or action compel incriminating responses from an individual in custody. When the facts of this case are analyzed under the Fifth Amendment concept of interrogation and not under the Sixth Amendment concept of definition as set forth in *Massiah* v. *United States*, 377 U.S. 201 (1964), and *Brewer* v. *Williams*, 430 U.S. 387 (1977), it is abundantly clear that the respondent was not compelled to incriminate himself. Indeed, accepting for the purpose of argument only the broadest definition of the term interrogation devised by lower courts in cases involving the Fifth Amendment, the police conduct in the case at bar was neither intended nor likely to elicit incriminating responses from this respondent. Therefore, his admissions were not the result of interrogation.

II. Even if the State is wrong in concluding there was no interrogation, it does not necessarily follow that the respondent could not thereafter have validly waived his *Miranda* rights. In view of the nonegregious conduct involved, there was sufficient attenuation to dissipate any taint generated by the initial illegal activity.

III. Even if the State is wrong in its analysis of the interrogation and waiver, it does not follow that the *Miranda* exclusionary rule is absolute and all-pervasive. Such a result conflicts with the decisions of this Court in *Harris* v. *New York*, 401 U.S. 222 (1971), and *Michigan* v. *Tucker*, 417 U.S. 433 (1974).

In general, the Court has permitted use of illegally obtained evidence for certain purposes. *United States* v. *Calandra*, 414 U.S. 338 (1974).

The State submits that this Court has adopted a flexible approach in determining the extent to which judicial sanctions

will be imposed and that this approach requires examination of the nature of the violation, and the collateral purpose for which the "illegally" obtained statement is to be used. In the instant case, the statement resulted in the location of the shotgun. Since the statement here was not elicited through coercive police methods which would render it involuntary and unreliable, to prohibit its use to obtain real evidence, which is reliable in itself, would not further the public interest in having guilt or innocence determined on the basis of trustworthy evidence. Where there is no evidence of flagrant or intentional bad faith action on the part of the police, the deterrent purpose of the exclusionary rule would not be effectuated by exclusion of real evidence.

Furthermore, the Fourth Amendment exclusionary rule which requires suppression of fruits of a direct constitutional violation (e.g., *Wong Sun* v. *United States*, 371 U.S. 471 [1963]) is inapplicable. The violation in the instant case is of *Miranda* prophylactic procedural rules only. Moreover, even if *Wong Sun* is applicable, its applicability should be limited to those situations in which police conduct rendered the statement involuntary. The *Miranda* violation is but one factor to be considered in addition to other relevant factors described in *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 226 (1973).

Argument.

I. There is No Violation of the Fifth Amendment Privilege Against Compelled Self-Incrimination nor of Miranda v. Arizona, Where There is No Interrogation.

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), the Court addressed the admissibility of oral and written statements obtained from defendants who had been subjected to custodial interrogation. The Court noted the key features present in the cases:

> "[I]ncommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights." *Id.* at 445.

The Court ruled that whenever an individual is thrust into this situation he is entitled to certain procedural safeguards which must be employed to protect the individual's Fifth Amendment privilege against compelled self-incrimination. Thus, prior to any questioning, a defendant must be informed:

> "that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement." *Id.* at 479.

The Court deemed these requirements to be "fundamental with respect to the Fifth Amendment privilege" and a prerequisite "to the admissibility of any statement made by a defendant." *Id.* at 476.

The factual premise for the majority's holding was a finding that custodial interrogation by law enforcement authorities is inherently coercive. Without the enumerated warning and waiver requirements, an individual's decision to speak could not be considered free or voluntary.

> "Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." *Id.* at 458.

However, the Court made it clear that the "fundamental import of the privilege" is not whether an individual in custody may talk to the police with or without the benefits of warnings and counsel, but whether he may be *interrogated*. *Id.* at 478.

The Court in subsequent decisions has further described the circumstances which trigger the *Miranda* "protective devices," but only from the perspective of the coercion or compulsion generated by the custodial aspects of the situation. *Oregon* v. *Mathiason*, 429 U.S. 492 (1977); *Beckwith* v. *United States*, 425 U.S. 341 (1976); *Orozco* v. *Texas*, 394 U.S. 324 (1969); *Mathis* v. *United States*, 391 U.S. 1 (1968). See generally *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 247 (1973). Most recently, in *Oregon* v. *Mathiason*, *supra*, and *Beckwith* v. *United States*, *supra*, the Court refused to extend the meaning of the word "custody" as it was used in *Miranda*, *supra*. In the former case this Court held that a statement by a parolee who had come to the police station at a police officer's request, who was told falsely that his fingerprints had been found at the

scene of the crime, and who was "interviewed" for one-half hour, during which time he confessed, was not the result of custodial interrogation. Since his personal freedom had not been restricted, he was simply not in custody.

> "Such a noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a 'coercive environment.'" 429 U.S. at 495.

While the Court has not directly addressed any circumstances where the existence or non-existence of interrogation was in issue, it certainly has not expanded the meaning of the word as it was employed in *Miranda* v. *Arizona, supra*. Nor, in view of its treatment of the issue of custody, has it even indicated that it has such an inclination.[4] It is the State's position that the decision of the Supreme Court of Rhode Island was patently erroneous concluding that *Brewer* v. *Williams*, 430 U.S. 387 (1977), had redefined and expanded the meaning of custodial interrogation to include a terse conversation between police officers which was neither intended nor likely to compel incriminating responses from the respondent. Every situation involving verbal or even nonverbal police conduct is not "converted to one in which *Miranda* applies" simply because a defendant is in custody. The State submits that the lower court failed to recognize the difference between interrogation under the Fifth Amendment and interrogation under the Sixth Amendment. Consequently, its conclusion that the

[4]See generally, Stone, *The Miranda Doctrine in the Burger Court*, 1977 Sup. Ct. Rev. 99.

events which took place in the case at bar violated *Miranda* v. *Arizona, supra*, rests upon a factually and legally defective analysis.

A. *Interrogation which Results in a Violation of the Sixth Amendment Right to the Assistance of Counsel does Not Necessarily Violate the Fifth Amendment Privilege Against Self-Incrimination.*

In *Brewer* v. *Williams*, the Court specifically rested its decision on the Sixth Amendment right to the assistance of counsel. After concluding that the fact pattern in *Brewer* was constitutionally indistinguishable from that presented in *Massiah* v. *United States*, 377 U.S. 201 (1964), the Court reiterated that:

> ". . . the clear rule of *Massiah* is that once adversary proceedings have commenced against an individual, he has the right to legal representation when the government interrogates him." 430 U.S. at 401.

It is clear, however, from a reading of *Massiah* v. *United States, supra*, that the term interrogation as employed in that case has a much broader and a very different meaning than it was subsequently given in *Miranda*. The State suggests that, once a defendant's Sixth Amendment right to counsel attaches, the existence or non-existence of interrogation as the word is normally used becomes or should become "constitutionally irrelevant."[5] An analysis of *Miranda* and *Massiah* makes this proposition abundantly clear.

[5]See generally, Kamisar, Y., *Brewer* v. *Williams, Massiah, and Miranda: What is "Interrogation"? When Does It Matter?*, 67 Geo. L.J. 1, 4 (1978).

In *Miranda*, the Court was concerned with protecting a suspect or an accused from being compelled to incriminate himself in ignorance of his Fifth Amendment rights. Thus the Court decided that a waiver of that right would only be recognized after *Miranda* warnings are given. However, *Miranda* rests upon two footings, custody and interrogation by law enforcement authorities. Without that combination of factors and without the interplay between the two, there is no infringement of the privilege against compelled self-incrimination.[8]

The Court in *Miranda* noted that, in each of the four cases before it,

> "the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures.
>
> . . . . . .
>
> "It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation." *Id.* at 457.

The danger to be guarded against was psychological as well as physical coercion exerted by law enforcement authorities over a person in their control. Each of the cases reviewed in *Miranda* involved extensive questioning by police officers at the police station of a person who was well aware of the forces which were being and could be brought to bear upon him.

The defendant's position in *Massiah* was at the opposite end of the spectrum when compared to the positions of the defend-

[8] *Id.* at 63, 64.

ants in *Miranda* and the companion cases. Massiah was at liberty and had no idea he was being interrogated. The defendant Massiah had been indicted, retained counsel, pleaded not guilty and was released on bail. A few days later Colson, a co-defendant, agreed to act as a government agent. He subsequently engaged the defendant in a conversation in the privacy of Colson's car. Unbeknown to Massiah, the entire conversation was overheard by federal agent Murphy. During this conversation Massiah made several incriminating remarks which were repeated by Murphy at the defendant's trial. The Court held that the defendant had been denied the basic protections guaranteed by the Sixth Amendment when:

> "there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." 377 U.S. at 206.

The Court saw no distinction between the situation illustrated by *Spano* v. *New York*, 360 U.S. 315 (1959), where the defendant, after indictment, was interrogated in a police station, and the situation present in *Massiah* where the defendant had no idea he was "under interrogation by a government agent." *Id.*

As Justices White, Clark and Harlan noted in the dissent, the record in *Massiah* was devoid of any indicia of compulsion, and consequently the "Court's newly fashioned exclusionary principle [went] far beyond the constitutional privilege against self-incrimination." *Id.* at 209.

> "At the time of the conversation in question, petitioner was not in custody but free on bail. He was not questioned in what anyone could call an atmosphere of official coercion. . . . There was no suggestion or any possibility of coercion." *Id.* at 211.

It is clear that Massiah had no idea the government was attempting to elicit incriminating information. His conversation with the co-defendant was friendly and took place in the privacy of Colson's car. There was absolutely no compulsion to speak. As Mr. Justice White noted in his dissent,

> "Had there been no prior arrangements between Colson and the police, had Colson simply gone to the police after the conversation had occurred, his testimony relating Massiah's statements would be readily admissible at the trial. . .." *Id.* at 211 (White, J., dissenting).

Thus, it is clear from both the majority and the dissenting opinions that the *Massiah* doctrine applies regardless of the defendant's awareness that he is being interrogated. *Massiah* prohibits the government or anyone acting on behalf of the government from deliberately eliciting or inducing incriminating statements from a defendant once adversary judicial proceedings have commenced.[7] It is irrelevant whether he is in custody, and whether he is even aware that the government is interrogating him. *Massiah* clearly stands for the proposition that, once adversary proceedings have commenced against an individual, he is entitled to the assistance of counsel, regardless and independent of any government interrogation.[8] The commencement of adversary proceedings, not custodial interrogation, is the linchpin of the *Massiah* rule.

This interpretation is further supported by the Court's summary treatment of *McLeod* v. *Ohio*, 381 U.S. 356 (1965). In that case a defendant had made incriminating statements while aiding the police in locating evidence of the crime. He

[7] *Id.* at 63.

[8] *Id.* at 33.

had been indicted but neither requested nor was represented by counsel. The Ohio Court of Appeals had found no evidence of coercion, threats, or promises. This Court found *Massiah* dispositive. See also *Beatty* v. *United States*, 389 U.S. 45 (1967) (rev'd per curiam, citing *Massiah* v. *United States*, *supra*.)

The Court's decision in *Hoffa* v. *United States*, 385 U.S. 293 (1966), further illustrated the distinction between *Massiah* and *Miranda*. In *Hoffa*, Partin, a government informer, was privy to the private discussions of the defendant while he was on trial for violations of the Taft-Hartley Act. Partin's reports to federal agent Sheridan during the Test Fleet trial and his subsequent testimony during the defendant's trial for jury tampering unquestionably contributed to his conviction. The Court, in rejecting Hoffa's argument under the Fifth Amendment, noted that *Miranda* was predicated upon the inherently compelling pressures generated by custodial interrogation:

> "In the present case no claim has been or could be made that the petitioner's incriminating statements were the product of any sort of coercion, legal or factual. The petitioner's conversations with Partin and in Partin's presence were wholly voluntary. For that reason, if for no other, it is clear that no right protected by the Fifth Amendment privilege against compulsory self-incrimination was violated in this case." *Id.* at 304.

The Fifth Amendment does not protect one from confessing, only from being compelled to confess. Compare also *Osborn* v. *United States*, 385 U.S. 323 (1966); *United States* v. *White*, 401 U.S. 745 (1971).

The Supreme Court of Rhode Island stated explicitly that one of the issues on appeal was "whether defendant [had been]

'interrogated' within the meaning of *Miranda* . . ." (Pet. App. 4a). However, for the court to assume that the law and facts of *Brewer* were dispositive of the *Miranda* question was erroneous.

In *Brewer*, the Court stressed three key factors which rendered the case amenable to a *Massiah* analysis: judicial proceedings had been initiated against Williams prior to the drive to Des Moines, that is, a warrant had been issued for his arrest, he had been arraigned, and committed by the court to confinement; Detective Leaming "deliberately and designedly" set out to elicit incriminating responses from Williams knowing full well that Williams was represented by counsel, had consulted with counsel, and had been instructed not to say anything and that Leaming had been instructed and had agreed not to question the defendant; and Detective Leaming deliberately isolated Williams from counsel. 430 U.S. at 399, 400. The Court decided, and indeed the State of Iowa conceded, that Leaming's "Christian burial speech" was tantamount to the type of governmental interrogation which violates the Sixth Amendment guarantee of the assistance of counsel as enunciated in *Massiah*. *Id.* at 399-401.

Whether this was the type of "interrogation" which would have compelled incriminating responses in violation of the Fifth Amendment privilege was neither discussed nor relevant to the disposition of *Brewer*. What this Court might have concluded had the Fifth Amendment's applicability been discussed rests in the realm of conjecture. However, one thing is certain: whatever the atmosphere, whatever the type of questioning, Detective Leaming admittedly sought to elicit or induce incriminating responses from Williams after the commencement of adversary proceedings, and this fact flies directly in the face of the decision in *Massiah* v. *United States*, *supra*.

The record in the case at bar is devoid of any of the elements this Court found controlling in *Brewer*. The Rhode Island Supreme Court erred in analyzing the facts of the case before it in terms of *Brewer*. The decisions in *Brewer* and *Massiah* are grounded on the Sixth Amendment right to the assistance of counsel and the Sixth Amendment had no applicability to the respondent's case because adversary proceedings had not been instituted against him at the time of the patrol car ride. The admissibility of the shotgun should have been determined by deciding whether Innis had been forced to incriminate himself in violation of the Fifth Amendment.

B. *There is No Interrogation in Violation of the Fifth Amendment Where Police Conduct is Neither Intended Nor Likely to Compel Incriminating Responses from a Suspect who is in Custody.*

The Supreme Court of Rhode Island should have employed a Fifth Amendment analysis when it considered whether the respondent had been interrogated. Under such an analysis only one thing is relevant — custodial interrogation. Admittedly, this respondent was in custody. However, the State submits that Officer Gleckman's remark concerning the location of a nearby school was neither intended nor likely to compel incriminating responses from Innis and therefore was not interrogation.

The events which took place in the patrol car in which the respondent Innis was riding cannot be categorized as interrogation which amounts to a violation of the privilege against self-incrimination when measured against *Miranda*. The linchpin of the *Miranda* decision was the inherent coercive nature of incommunicado custodial interrogation by the government. In *Miranda*, the defendant was arrested and was interrogated in an interrogation room by two police officers for

two hours. In the companion case of *Vignera* v. *New York*, the defendant was arrested and questioned by one detective, then removed to another station and questioned again by an assistant district attorney. In the second companion case of *Westover* v. *United States*, the defendant was arrested, interrogated on the night of his arrest and the following morning, and turned over to the FBI which continued the interrogation for two and one-half hours until he finally confessed. Finally, in the third companion case, *California* v. *Stewart*, the defendant was arrested, removed to the police station and interrogated on nine separate occasions over the course of five days until he confessed. All of these cases involved extensive and repeated *questioning* by police officers in the police station *until* confessions or admissions were obtained. The records did not adequately demonstrate in any of the cases that the defendants had been informed of or were aware of their constitutional rights.

Some aspects of "*Miranda* interrogation" which the Court had addressed in previous decisions are highlighted incidentally in the discussion in *Brewer* v. *Williams*. It is clear: that interrogation need not be in the form of a question; that interrogation may involve the use of psychological ploys as well as the more obvious direct question; and that the police must intend to produce incriminating responses. However, there is certainly nothing expansionistic or innovative about these observations. See *Miranda* v. *Arizona*, *supra*; *Escobedo* v. *Illinois*, 378 U.S. 478 (1964); *Lynumn* v. *Illinois*, 372 U.S. 528 (1963); *Spano* v. *New York*, *supra*. Isolating those elements of *Brewer* v. *Williams*, *supra*, which are relevant to a discussion of interrogation under the Fifth Amendment principles of *Miranda*, the following salient features become noticeable: the police knew of and made use of the defendant's mental inbalance and "quixotic religious convictions," 430 U.S. at 412 (Powell, J., concurring); the police intended to isolate Williams

from his attorney in order to obtain all the information they could before reaching Des Moines (*id.* at 399); the defendant was alone in the car for three to four hours with two police officers (*id.* at 408) (Marshall, J., concurring); Detective Leaming informed Williams prior to leaving, despite William's protestations to the contrary, that they would be visiting (*id.* at 391, 392); Detective Leaming knew the girl was dead[9]; Detective Leaming also knew that the location of the body would eventually be revealed (*id.* at 408) (Marshall, J., concurring); Leaming was an experienced interrogator as evidenced by the many classic techniques employed in delivering the Christian burial speech (*id.* at 412) (Powell, J., concurring)[10]; and Williams felt threatened, with or without cause, by the police.[11] This record reveals that Detective Leaming intentionally created an environment and employed classic interrogation skills to which Williams was likely to respond for no other purpose than to elicit incriminating responses from the suspect.

The State submits that the facts presented in the case at bar do not even approach in constitutional infirmity those which were presented in *Miranda* and the companion cases or in *Brewer*. While the defendant was in custody, it was neither incommunicado, nor was he threatened or intimidated. Innis had been in custody only a matter of minutes. Officer Lovell testified that as he drove along Chalkstone Avenue, the respondent Innis was "standing on the street," facing the car (A. 16). When the patrolman stopped the car, respondent continued to stand there, and then walked towards the car. There was no fight (A. 16-17). As they waited for the others to

---

[9] *Id.* at 9, 10 (quoting from Joint App. 92-93, 96-97, 108-109).

[10] Kamisar, *Foreword: Brewer* v. *Williams — A Hard Look at a Discomfiting Record*, 66 Geo. L.J. 209, 211, 215-233 (1977).

[11] *Id.* at 220, n. 49 (quoting from Joint App. at 79-80, 94-95, 96).

arrive, the respondent requested and was given a cigarette (A. 18). The respondent was immediately informed of his rights by each officer (A. 13, 14, 27, 29, 33, 35). The captain immediately complied with his request for an attorney by arranging for his immediate return to the station (A. 35). Unlike the situation in *Brewer*, there was nothing in the captain's response to Innis and his instructions to the patrolmen to indicate that Innis' choice would not be "scrupulously honored." As the Court noted in *Michigan* v. *Mosley*, 423 U.S. 96 (1975), when law enforcement authorities respect a suspect's exercise of his *Miranda* rights, that fact "counteracts the coercive pressures of the custodial setting." *Id.* at 104. Thus, in view of the initial police response to Innis, and his own demeanor, it is clear that any coercive pressures generated by the arrest were at best significantly reduced or at worst merely those generated by any arrest.

The situation in the caged wagon is also completely different from that present in *Miranda* and *Brewer*. The defendant was not seated for hours next to an experienced senior officer. He was seated for a matter of minutes next to a patrolman who had been given explicit instructions not to question, intimidate or coerce him in anyway (A. 22-23, 38). No questions or remarks were directed towards Innis (A. 44, 46, 53-54, 58-59). While this situation is admittedly "custodial" under *Miranda*, it is certainly not of the type or nature which this Court found inherently coercive in *Miranda*. Nor is it the type of fear-generating custodial situation in which *Brewer* was held for hours.

The remarks in question were neither intentional nor likely to evoke a response. Only a cynic could conclude that Gleckman, a patrolman with less than two years on the force, planned and executed the "ploy" during the three to five minutes between the time he was assigned to the wagon by Captain Leyden and the point when Innis volunteered to

locate the shotgun. There is no language in the remarks which would lead one to conclude that they were aimed at Innis. There were no insults, no conjectures about Innis' responsibility should an accident occur. As the trial judge noted, it was "entirely understandable" that these officers would have voiced their concerns to one another (A. 63). Furthermore, to conclude that Gleckman really expected that Innis, who was accused of robbing a cab driver with a sawed-off shotgun, would respond to the plight of hypothetical small children is fairly unreasonable. There is no evidence, as was present in *Brewer*, that Innis in fact was known to have a concern for children (A. 62-63).

The State submits that where a defendant is informed of his rights, is not held incommunicado, is neither threatened nor thrust into a coercive environment beyond that inherent in an arrest, and overhears a conversation which is neither intended nor likely to elicit an incriminating response from him, then there is no interrogation.[12]

---

[12] Even those lower courts which have addressed the question of what constitutes interrogation and which have imposed a strict definition have stressed the existence of intent on the part of the police and/or the compelling nature of the question, statement or nonverbal conduct. In *United States* v. *McCain*, 556 F. 2d 253 (5th Cir. 1977), prior to advising a suspected drug smuggler who was in custody of her *Miranda* rights, a customs inspector "informed" her of the serious danger posed by carrying drugs internally, thus prompting her admission. The court found that the inspector deliberately and designedly set out to elicit incriminating admissions and that this amounted to interrogation. The court in *Combs* v. *Wingo*, 465 F. 2d 96 (6th Cir. 1972), found that immediately confronting a defendant who had requested counsel with a ballistics report amounted to interrogation since the "only possible object of showing the . . . report . . . was to break him down and elicit a confession from him." *Id.* at 99. In *Commonwealth* v. *Mercier*, 451 Pa. 211, 302 A. 2d 337 (1973), despite a defendant's refusal to answer questions until counsel arrived, the police immediately confronted him with a co-defendant's statement implicating him. The court considered this "interrogation" since it was intended or likely to elicit a confession. Compare,

In the case at bar the record is barren of any indication that Innis was abused, threatened, coerced or tricked into revealing the location of the gun. After he directed the officers to turn the car around nothing more was said. Upon their return to the scene, Innis stepped out of the car and was again advised of his *Miranda* rights by Captain Leyden. Innis expressly acknowledged that he understood these rights but nevertheless wished to retrieve the gun. The State Supreme Court's conclusion that Innis had been interrogated logically requires that police "assume the role of contemplative monks" or that suspects be transported and confined in sterile atmospheres free from any and all oral and visual stimuli which might cause them to reconsider a previous assertion of *Miranda* rights (Pet. App. 18a-19a). Such a result extends the term "interrogation" to the point of absurdity. The decision in *Miranda* made it clear that:

> "Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." *Id.* at 478.

The State submits that the admission made in the case at bar was not the product of interrogation since it was not compelled. The respondent, however motivated, freely and voluntarily elected to disclose the location of the weapon.

Haire v. *Sarver*, 306 F. Supp. 1195 (E.D. Ark. 1969), aff'd, *Haire* v. *Sarver*, 437 F. 2d 1262 (8th Cir. 1971), where the court found that a defendant, who had been in custody for several hours, was not interrogated when he responded to questions which the police had directed to his wife in his presence.

> "Defendant at no time was asked a single question and at the time he made the voluntary statements both he and his wife apparently were cooperative with the officers. There is no background or atmosphere here in any wise comparable to the four cases in *Miranda*." 437 F. 2d at 1264.

II. The Respondent Knowingly and Voluntarily Waived his Rights under Miranda After the Fourth Set of Miranda Warnings had been Given.

Assuming, *arguendo*, that the respondent was interrogated in violation of *Miranda* v. *Arizona*, *supra*, the Rhode Island Supreme Court's perfunctory conclusion that the respondent's subsequent waiver in response to the fourth warning was inadmissible "fruit of the poisonous tree" was clearly erroneous. The State submits that there was a sufficient amount of attenuation between the "interrogation" in the car and the respondent's decision to lead the police to the gun to make that decision a valid waiver of Innis' *Miranda* rights.

Innis had not been intimidated, coerced or threatened. His request for counsel had been scrupulously honored except for the one conversation. Upon his return to the scene, Innis was removed from the car (A. 36). He was removed from the control of his "interrogators" to a different environment and placed under the direct control of Captain Leyden. This officer, who had previously complied with Innis' requests, once more read him his *Miranda* rights and asked specifically if Innis understood. The respondent replied affirmatively, indicating that he wanted to get the gun out of the way because of the small children in the area (A. 36, 39).

It is clear that the police officers were not "exploiting" previous illegal action. Unlike the situation in *Brewer*, the respondent was removed from the control of his "inquisitors" and reminded of his rights and the consequences of his action. In *Brewer* the defendant was subjected to the ever-increasing pressures generated by Detective Leaming's presence and statement and the long car ride ahead. Leaming never pref-

aced his speech with renewed *Miranda* warnings. Furthermore, Williams had repeatedly stated that he did not want to talk.

The Court in *Brewer* reiterated that the Sixth Amendment right to the assistance of counsel may be waived "without notice to or consultation with counsel." 430 U.S. at 413 (Powell, J., concurring). In *Brewer*, the facts demonstrated "comprehension" but did not demonstrate "relinquishment." *Id.* at 404. The record "provide[d] no reasonable basis for finding that Williams waived his right to the assistance of counsel." *Id.* at 405. The State submits that the record in the case at bar affirmatively demonstrated an intentional waiver of rights. See *North Carolina* v. *Butler*, ____ U.S. ____, 25 Cr. L. 3035 (1979).

The State further submits the Rhode Island Supreme Court erred in finding *Wong Sun* dispositive of the waiver argument. This Court has never applied the *Wong Sun* doctrine to *Miranda* violations. Indeed, in *Brown* v. *Illinois*, 422 U.S. 590 (1975), the Court noted that the *Miranda* warning is a "prophylactic rule" and a "procedural safeguard" and that the exclusionary rule under the Fourth Amendment "serves interests and policies that are distinct from those it serves under the Fifth." *Id.* at 600, 601.[13]

The State submits that no valid purpose of the exclusionary rule as enunciated in *Wong Sun* would be served by excluding the respondent's second admission which led to the discovery of the shotgun.

[13] This issue is addressed in part III D of the petitioner's brief.

III. Physical Evidence Located and Seized as a Result of a Statement Obtained in Violation of Miranda v. Arizona is Not Per Se Inadmissible.

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), the Court deemed it necessary to construct an absolute rule mandating the exclusion of statements obtained in the absence of certain warnings because of the apparent practical difficulties in determining whether, in any given case, the self-incrimination clause has been violated.

The Court acknowledged that in reviewing confessions obtained in an incommunicado police-dominated atmosphere, "we might not find the defendants' statements to have been involuntary in traditional terms." *Id.* at 457. Nevertheless, the Court instituted a presumption of involuntariness where the suspect makes a statement without first having been fully advised of his right to counsel and his right to remain silent. The critical concern of the Court was the dangers inherent in "incommunicado" interrogation. *Id.* at 445. Upon exhaustive analysis of commonly employed investigatory techniques, it found that, despite all official efforts at reform, sophisticated police practices, primarily psychological in nature, were still being employed to extract confessions. *Id.* at 445-454.

However, the decision in *Miranda* v. *Arizona* was limited to the admissibility of statements which are obtained from an individual subjected to custodial police interrogation in the prosecution's case in chief. *Id.* at 445. The Court did not address itself directly to the admissibility of real evidence located as a result of statements obtained in violation of the *Miranda* safeguards, nor to what collateral use, if any, could be made of these statements.[14]

[14] It is true that the *Miranda* majority stated: "unless and until . . . warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against [the defendant]" (384

The Supreme Court of Rhode Island has read *Miranda* to require the *per se* exclusion of not only the impermissibly obtained statements themselves but of all evidence derived from those statements as well. The court below concluded, with very little discussion, that:

> ". . . to allow the shotgun to be admitted into evidence would be to allow the state to benefit from the illegal actions which occurred in the police wagon. The seizure of the weapon was the product of the improper remarks of Officer Gleckman. Because of this inescapable fact, the weapon and any evidence leading to its discovery must be suppressed as 'fruit of the poisonous tree.' We have no doubt that the discovery of the shotgun occurred as a result of an 'exploitation' of the original illegality. *Wong Sun* v. *United States*, 371 U.S. 471, 487-88, 83 S. Ct. 407, 417, 9 L. Ed. 2d 441, 455 (1963)." *State* v. *Innis*, 391 A. 2d 1158, 1164 (1978) (Pet. App. 11a).

U.S. at 479). Two of the dissenters evidently feared the application of the "fruit of the poisonous tree" doctrine to *Miranda* violations. See 384 U.S. at 500 (Clark, J.); cf. 384 U.S. at 545 (White, J.). However, even if the quoted phrase in the majority opinion was intended to refer to derivative evidence, the statement must be considered dictum, since none of the *Miranda* cases involved the use of "fruits" of unlawfully obtained statements.

There has, moreover, been doubt among legal scholars that the Court could have intended in one casual sentence to dispose of the complex question of the scope of the exclusionary rule devised in the *Miranda* decision. Judge Friendly reads "evidence obtained as a result" to mean the statements made during an unlawful interrogation, rather than evidence derived from leads developed during a period of improper questioning. Friendly, *Benchmarks* (U. Chi. Press 1967), at 279. See also Edwards, *Interrogation of Criminal Defendants — Some Views on Miranda* v. *Arizona*, 35 Fordham L. Rev. 169, 193 (1966).

Finally, the issue was raised in *Orozco* v. *Texas*, 394 U.S. 324 (1969), but was not reached.

Assuming, *arguendo*, that the respondent's statements in the car and to Captain Leyden should have been suppressed,[15] this broad interpretation of the judicial sanctions imposed by *Miranda* is inconsistent with the rulings of this Court which have permitted the collateral use of such statements at trial and have permitted the introduction at trial of evidence derived from such statements while not permitting the use of the statements themselves in the case in chief. Here the evidence which the State sought to introduce, the shotgun, was located by the respondent after the police had inadvertently made him aware of the location of a nearby school and after reminding him of his *Miranda* rights.

In *Harris* v. *New York*, 401 U.S. 222 (1971), this Court held that statements made by a defendant in custody without being advised of his right to appointed counsel could be used to impeach the defendant's credibility should he testify at trial. The Court stated:

> "Some comments in the *Miranda* opinion can indeed be read as indicating a bar to use of an uncounseled statement for any purpose, but discussion of that issue was not at all necessary to the Court's holding and cannot be regarded as controlling. *Miranda* barred the prosecution from making its case with statements of an accused made while in custody prior to having or effectively waiving counsel. It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards." 401 U.S. at 224.

---

[15] The State is assuming for the purpose of this argument that all testimony concerning what the respondent said and did would be excluded. The State would argue that its admission was harmless error. *Chapman* v. *California*, 386 U.S. 18 (1967); *Harrington* v. *California*, 395 U.S. 250 (1969); *Milton* v. *Wainwright*, 407 U.S. 371 (1972).

The Court noted that there was no suggestion "that the statements made to police were coerced or involuntary." *Id.* Under these circumstances, the Court then balanced the deterrent effect of exclusion against society's interest in a full and fair hearing, stating:

> "The impeachment process here undoubtedly provided valuable aid to the jury in assessing petitioner's credibility, and the benefits of this process should not be lost . . . because of the speculative possibility that impermissible police conduct will be encouraged thereby. Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief." *Id.* at 225.

Again, in *Michigan* v. *Tucker*, 417 U.S. 433 (1974), the defendant had been given incomplete *Miranda* warnings; his statements led police to a third-party witness who testified at trial. The Court held that use of this testimony was not a forbidden derivative use of the defendant's initial statements, and, in so doing, explicitly distinguished between a *Miranda* violation and a violation of the constitutional privilege against self-incrimination. *Id.* at 444. The Court, noting that the interrogation involved "no compulsion sufficient to breach the right against self-incrimination" (*id.* at 445), held that the interests of justice in a full hearing on the basis of all trustworthy evidence outweighed the value of a deterrent effect, if any, in the exclusion of such evidence.

This Court has repeatedly rejected a *per se* application of the exclusionary rule. In *United States* v. *Calandra*, 414 U.S. 338 (1974), the Court held that evidence seized in violation of the Fourth Amendment, though inadmissible at trial, could be

used in grand jury proceedings. Similarly, the Court has declined to extend the exclusionary rule to hold inadmissible in a federal civil tax proceeding evidence obtained by a state law enforcement officer pursuant to a search warrant later proved to be defective. *United States* v. *Janis*, 428 U.S. 433 (1976). Most recently, this Court has held admissible living witness testimony which was the fruit of an illegal search. *United States* v. *Ceccolini*, 435 U.S. 268 (1978). In general, the Court has declared:

> "Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons." *Brown* v. *Illinois*, 422 U.S. 590, 600 (1975).

The thrust of these cases, it is submitted, constitutes an obvious rejection of a *per se*, inflexible application of the exclusionary rule to proscribe use of illegally seized evidence for all purposes in all proceedings. The inflexible application of the exclusionary rule utilized by the court below is simply not mandated as a matter of federal constitutional law.[16]

Consistent with *Michigan* v. *Tucker*, *supra*, a determination to apply the exclusionary rule should take into account the nature of the violation, the nature of the evidence located as a re-

[16] The State does not contend that the fruits of illegally obtained statements should never be excluded. When the *Miranda* violation consists of deliberate and flagrant abuse of the accused's constitutional rights, amounting to a denial of due process, application of the exclusionary principle would appear warranted. See Friendly, *Benchmarks*, *supra*, at 260-261, 282. However, where, as here, the *Miranda* violation is merely a technical one and no actual constitutional violation is alleged or proved by the defendant, exclusion of the statements alone is sufficient to serve the purposes of deterring illegal conduct and ensuring the trustworthiness of evidence for which the *Miranda* exclusionary rule was fashioned.

sult of the violation and the effect of applying the exclusionary rule, balanced against the interests of justice and society in having guilt or innocence determined on the basis of trustworthy evidence.

A. *Nature of the Violation.*

In the instant case the record is devoid of any indicia of deliberate police misconduct. Innis received *Miranda* warnings from three different police officers in succession before he was placed in the police wagon (A. 17-18, 29, 35). While waiting for the other officers to arrive, Innis was seated in a police car. He requested and received a cigarette from Patrolman Lovell (A. 18). When Innis requested an attorney, Captain Leyden immediately complied with his request (A. 35). Innis was placed in the car with two patrolmen in front and one in back (A. 43).

The officers were instructed not to question, intimidate, or coerce him (A. 46), just transport him to the front office, that is, the business office at the Central Station (A. 46, 54). Within minutes of leaving the scene of the arrest one officer made a casual remark to another concerning the location of a school in the area and the likelihood of a child locating the gun before the police did[17] (A. 43-44, 52-53, 58). To this Innis spontaneously replied: "Stop, turn around, I'll show you where it is" (A. 44, 50, 58). After the wagon returned to the scene of the arrest, Innis was once more advised of his *Miranda* rights and afforded an opportunity to respond (A. 36, 38, 39). After his affirmative response, the group drove further up the road. Innis got out of the car and directed the search (A. 39-40). The respondent did not locate the weapon immediately (A. 14-15,

[17] There is no contention that this statement of fact was untrue (Pet. App. 25a, 27a).

23-24, 30). Thus, after his spontaneous remark, Innis had an opportunity to change his mind. There was no compulsion for Innis to follow through with his initial spontaneous offer of assistance.

The trial judge noted that he was impressed with the credibility of the officers who testified (A. 62). He further found that it was "entirely understandable" that three officers, out at four in the morning, who have reason to believe that a loaded weapon is in the area of a school for retarded and handicapped children, would voice their concern to each other (A. 62). There is nothing in the record which indicates any deliberate police misconduct, any trickery, or any dishonest purpose to coerce or intimidate the respondent. The single factor which the reviewing court found violative of *Miranda* was Gleckman's casual observation (Pet. App. 7a). The court concluded that, because of this interrogation, the respondent did not subsequently knowingly and intelligently waive his rights (Pet. App. 10a-11a).

The State submits that nothing in the record indicates or even hints at involuntariness in the Fifth Amendment sense. The trial judge found there were no threats and there was no coercion (A. 63). The Supreme Court merely termed the remarks "highly improper" (Pet. App. 9a). There is no indication that the atmosphere was any more coercive than that which arises from the necessary or routine process of taking an individual into custody. The situation was not one where the police were attempting to subjugate the defendant to their will. Thus, there is nothing in the record to indicate that the respondent was compelled in a Fifth Amendment sense to incriminate himself.

B. *Nature of the Derivative Evidence.*

As in *Michigan* v. *Tucker*, *supra*, the evidence obtained as a result of the respondent's statement is highly reliable. Real

evidence carries with it greater indica of trustworthiness than oral testimony. *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 250 (1973) (Powell, J., concurring); see also *Stone* v. *Powell*, 428 U.S. 465, 497 (1976) (Burger, C.J., concurring). In the instant case there is absolutely no reason to doubt the reliability of the evidence, the shotgun, simply because the defendant became aware of the nearby location of a school after he had asserted his rights under *Miranda*.

Since there is nothing in the record which indicates involuntariness in the Fifth Amendment sense and the events surrounding the arrest and seizure are absolutely undisputed, there is no reason to exclude as a matter of law or policy such highly reliable evidence.

C. *The Consequences of Applying the Exclusionary Rule.*

Even where an exclusionary rule is otherwise justified, such a rule is generally "restricted to those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra, supra*, at 348. This determination necessarily involves a "balancing process" in which the likelihood of deterrence is weighed against the damage done to our system of justice by the exclusion of relevant evidence. *Id.*

It seems reasonably clear, based on empirical evidence, that the extension of the exclusionary rule to the fruits of a statement taken in violation of *Miranda's* prophylactic rules is not likely to undermine the deterrent effects of the exclusionary rule. If studies which have shown that the giving of *Miranda* warnings has had little effect on the decisions of most criminal defendants to speak[18] are correct, it is unlikely that law enforcement officers will risk losing the use of a full confession in the speculative hope of obtaining derivative evidence (which they will still have to connect to the defendant by evidence independent of his statement).

[18] Note, *Interrogations in New Haven: The Impact of Miranda*, 76 Yale L.J. 1519 (1967); Griffiths & Ayres, *A Postscript to the Miranda Project: Interrogation of Draft Protesters*, 77 Yale L.J. 300 (1967); Seeburger & Wettick, *Miranda in Pittsburgh — A Statistical Study*, 29 U. Pitt. L. Rev. 1 (1967); Medalie, Zeitz & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 Mich. L. Rev. 1347 (1968); Driver, *Confessions and the Social Psychology of Coercion*, 82 Harv. L. Rev. 42 (1968).

Indeed, in the case at bar, the police did not question Innis further once he had made a request, even though they believed the shotgun, either loaded or with shells, was located in the general area. Furthermore, Captain Leyden confronted Innis again with his *Miranda* rights and asked if he understood (A. 36).

This respondent was read the *Miranda* warnings on four separate occasions. There was no extended interrogation, no incommunicado questioning by a battery of skilled interrogators. There was only a single conversation overheard by the respondent in the car. It is difficult, if not impossible, to articulate a positive deterrent rationale for excluding the shotgun from evidence. As this Court stated in *Michigan* v. *Tucker, supra*,

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. . . . Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." *Id.* at 447.

Given only a speculative possibility that exclusion of the real evidence seized pursuant to an otherwise valid warrant would provide a positive deterrent effect on future police conduct,

the State suggests that the interests of the public and of justice in having a defendant's guilt or innocence determined on the basis of trustworthy evidence compels a result contrary to that reached by the Supreme Court of Rhode Island. *See Michigan* v. *Tucker*, *supra*. The lower court's automatic, *per se* application of the exclusionary rule is simply not compelled by federal standards and is inconsistent with this Court's efforts to balance the conflicting interests involved before applying the rule. Within the Fourth Amendment context this Court has recognized that the policies behind the exclusionary rule are not absolute. *See Stone* v. *Powell*, 428 U.S. 465 (1976).

> "I tend generally to share the view that the per se application of an exclusionary rule has little to commend it except ease of application. All too often applying the rule in this fashion results in freeing the guilty without any offsetting enhancement of the rights of all citizens. Moreover, rigid adherence to the exclusionary rule in many circumstances imposes greater cost on the legitimate demands of law enforcement than can be justified by the rule's deterrent purposes. . . . I therefore have indicated, at least with respect to Fourth Amendment violations, that a distinction should be made between flagrant violations by the police, on the one hand, and technical, trivial, or inadvertent violations, on the other. . . ." *Brewer* v. *Williams*, 430 U.S. 387, 413-414, n.2 (1977) (Powell, J., concurring).

The State urges this Court to apply a similar flexible approach when applying the exclusionary rule to a case falling solely within the context of *Miranda* v. *Arizona*, where the police conduct involved is neither flagrant, coercive, nor deliberate. Any other approach offends the sense of justice

when a violent criminal goes free as the result of inadvertent and, indeed, almost trivial police error.

D. *The "Fruit of the Poisonous Tree" Doctrine does Not Require Exclusion of the Physical Evidence Found with the Respondent's Assistance.*

The court below held that the evidence obtained as a result of the respondent's assistance must be excluded under the "fruit of the poisonous tree" doctrine. The court concluded that the weapon and any evidence leading to its discovery must be suppressed as "fruit of the poisonous tree" under *Wong Sun* v. *United States*, 371 U.S. 471 (1963) (Pet. App. 11a).

The State submits that this Court, however, has never applied the *Wong Sun* doctrine to *Miranda* violations, although the Court has indicated that in a "proper" case the doctrine might have applicability. *Michigan* v. *Tucker*, *supra*, at 447. The State submits that the "proper" case, unlike the instant case, would be one involving coercion or bad faith conduct on the part of police officers.

The State further submits that the "fruit of the poisonous tree" doctrine does not apply unless the initial illegality is of constitutional dimension and, further, that the deterrent purpose of the exclusionary rule in general would not be furthered by such application.

Wong Sun prohibited use of evidence derived from an illegal arrest and search which violated Fourth Amendment rights. Thus, the "primary illegality" which triggered application of the prohibition against use of derivative evidence involved a constitutional violation.

However, in *Michigan* v. *Tucker*, the Court expressly rejected an equivalence between *Miranda* violations and constitutional violations. *Id.* at 444-445. The Court, although

finding that *Miranda* had been violated, did not apply the *Wong Sun* doctrine, stating:

> "This Court has also said, in *Wong Sun* v. *United States*, . . . that the 'fruits' of police conduct which actually infringed a defendant's Fourth Amendment rights must be suppressed. But we have already concluded that the police conduct at issue here did not abridge respondent's constitutional privilege against self-incrimination, but departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege." *Id.* at 445-446.

The clear implication of *Tucker* is that the "fruit of the poisonous tree" doctrine would not be triggered unless that primary illegality involved an invasion of a specific constitutional guarantee and that a mere *Miranda* violation does not reach such a constitutional dimension.[19]

The "fruits" doctrine has been held by several lower courts to be inapplicable to *Miranda* violations in the absence of involuntariness. *United States ex rel. Hudson* v. *Cannon*, 529 F. 2d 890 (7th Cir. 1976);[20] *Simmons* v. *Clemente*, 552 F. 2d

[19] This interpretation is consistent with *Brown* v. *Illinois*, 422 U.S. 590 (1975). In *Brown*, the initial coercion arose from an arrest without probable cause in direct contravention of a constitutional guarantee. The Court merely held that the subsequent giving of *Miranda* warnings could not dissipate that taint.

[20] The Ninth Circuit, in *United States* v. *Lemon*, 550 F. 2d 467, 472 (9th Cir. 1977), did not resolve the issue, for the court held that a statement eliciting a consent to search did not implicate a Fifth Amendment right and therefore *Miranda* was inapplicable. The court, noting that *Miranda* warnings are not constitutional rights in themselves, did, however, hold that statements elicited prior to *Miranda* warnings could be introduced at a pre-trial suppression hearing to establish the validity of a search. But see *Tremayne* v. *Nelson*, 537 F. 2d 359 (9th Cir. 1976). See also *Null* v. *Wainwright*, 508 F. 2d 340 (5th Cir. 1975), cert. denied, 421 U.S. 970 (1975).

65 (2d Cir. 1977). See *Bartram* v. *State*, 33 Md. App. 115, 364 A. 2d 1119 (1976), and cases cited therein[21]; *Rhodes* v. *State*, 91 Nev. 17, 530 P. 2d 1199 (1975).[22]

The State submits that the only justification for an extension of the *Wong Sun* doctrine to situations involving the Fifth Amendment flows from a determination that the initial statement leading to derivative real evidence was involuntary as a result of compulsion or intentional bad faith conduct on the part of police which could be deemed to have "overborne the will" of the accused. In the instant case, no such finding of involuntariness has been made, nor would the facts support such a finding under the "totality of the circumstances" test. In *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973), this Court outlined the factors to be considered in determining voluntariness:

[21] In *In re Appeal No. 245*, 29 Md. App. 131, 349 A. 2d 434 (1975), the court acknowledged the distinction but found a fundamental violation of the constitutional right against self-incrimination. It is important to note that the court also found the initial illegal detention to be "patently flagrant." 29 Md. App. at 145, 349 A. 2d at 442.

[22] In a pre-*Tucker* case, *Keister* v. *Cox*, 307 F. Supp. 1173 (W.D. Va. 1969), a federal district court indicated its view that the Fifth Amendment as construed by *Miranda* did not necessarily operate to exclude physical evidence discovered as a result of disclosures made in violation of *Miranda*. The court, while apparently of the view that *Miranda* requirements were of parallel, co-equal status with the Fifth Amendment, distinguished between the Fifth Amendment bar as to compelled "testimony" and "real" evidence obtained through compulsion, citing *Schmerber* v. *California*, 384 U.S. 757, 764 (1966):

> "Under *Schmerber* and *Killough* then the gun is not necessarily made inadmissible by the mere fact that Keister showed the officers its whereabouts having not been first given the requisite warning under *Miranda*. The Commonwealth will have to identify the gun other than by *statements* made by the accused while in custody as a result of police interrogation." 307 F. Supp. at 1176 (emphasis in opinion).

". . . the youth of the accused, *e.g.*, *Haley* v. *Ohio*, 332 U.S. 596; his lack of education, *e.g.*, *Payne* v. *Arkansas*, 356 U.S. 560; or his low intelligence, *e.g.*, *Fikes* v. *Alabama*, 352 U.S 191; the lack of any advice to the accused of his constitutional rights, *e.g.*, *Davis* v. *North Carolina*, 384 U.S. 737; the length of detention, *e.g.*, *Chambers* v. *Florida*, *supra*; the repeated and prolonged nature of the questioning, *e.g.*, *Ashcraft* v. *Tennessee*, 322 U.S. 143; and the use of physical punishment such as the deprivation of food or sleep, *e.g.*, *Reck* v. *Pate*, 367 U.S. 433." 412 U.S. at 226.

See generally *Miranda* v. *Arizona*, *supra*, at 508 (Harlan, J., dissenting).

Assuming *arguendo* that there was an interrogation, the interrogation in the case at bar could not have lasted more than a minute (A. 21-22, 38). The respondent had been in custody a matter of minutes. There is no indication that he was treated abusively, intimidated or tricked. The record shows clearly that the police were striving to ensure that the respondent's rights were protected and there is no indication that Innis perceived the situation as otherwise. The transcript at sentencing reveals that the defendant has a long history of antisocial behavior (A. 75). Thus the situation he found himself in that night was not a new one.

The State suggests that the application of the exclusionary rule to require suppression of otherwise reliable and probative evidence discovered under circumstances free of coercive or bad faith conduct serves neither to effectuate the purpose of the exclusionary rule nor to best serve the interests of justice.

The primary purpose of the exclusionary rule is to deter police misconduct.

"'The rule is calculated to prevent, not to repair. Its purpose is to deter — to compel respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it.'" *United States* v. *Calandra*, 414 U.S. 338, 347 (1974), quoting *Elkins* v. *United States*, 364 U.S. 206, 217 (1960).

In order to effectuate this purpose, logically some intentional bad faith conduct must be involved. *Oregon* v. *Hass*, 420 U.S. 714 (1975). No such showing had been made.

The real evidence under attack in the instant case, as opposed to compelled testimony, carries its own indicia of reliability. Therefore, the alternative justification for application of the exclusionary rule — to protect "the courts from reliance on untrustworthy evidence" (*Michigan* v. *Tucker*, at 448) — is also inapplicable.

The rationale of *Michigan* v. *Tucker* is applicable to the instant case. The court below has erred in attributing immutable, independent constitutional status to the *Miranda* safeguards in direct conflict with this Court's decisions. The Supreme Court of Rhode Island, the State respectfully submits, has read too broadly the exclusionary requirement of *Miranda* v. *Arizona* as requiring *per se* exclusion for all purposes of statements taken in violation of its prophylactic standards.

E. *The Introduction of the Testimony Concerning What the Respondent Said and Did was Harmless Error.*

The Rhode Island Supreme Court concluded that the introduction of the respondent's admissions and the shotgun into evidence was not harmless error beyond a reasonable doubt. Should this Court rule that the respondent's second admission and the shotgun, or, alternatively, the shotgun, were properly

introduced into evidence, then the State submits that the introduction of any other admission was harmless error beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18 (1967); *Harrington* v. *California*, 395 U.S. 250 (1969); *Milton* v. *Wainwright*, 407 U.S. 371 (1972). The State introduced the following evidence:

On the evening of January 12, 1975, Mrs. Hall, of 107 Comstock Avenue, observed Innis saw off both the stock and barrel of a shotgun and leave her apartment with the weapon wrapped in a blue and white floral blanket. She identified the blanket at the trial (R. 161, 162, 164, 166).

A Mr. Hawkins, who also lived in the building knew Innis (R. 189, 190). He had previously observed a shotgun in Mrs. Hall's kitchen (R. 190, 191). On the night of January 12, 1975, Mr. Hawkins placed two calls to request a cab on Innis' behalf. At approximately 10:25 P.M., on January 12, 1975, Mr. Corcelli, the dispatcher of the Silver Top Cab Company, sent a cab operated by Mr. John Mulvaney to pick up the fare at 105 Comstock (R. 219). Mr. Hawkins testified that the defendant was carrying something rolled up in a blue and white floral blanket which he "cradled in his arms" (R. 193, 197). He identified the blanket at the trial (R. 193, 194). Thereafter, Mr. Hawkins saw a Silver Top Cab pull up and observed the respondent place the blanket in the back seat before getting into the front seat of the cab (R. 195). Mr. Hawkins then heard him say he was going to Prairie Avenue, No. 228 or 218 (R. 196)

After picking up Innis, John Mulvaney radioed the dispatcher to inform him he was going to East Greenwich, Rhode Island, and not to Prairie Avenue in Providence, as previously indicated (R. 219). This was the last anyone heard from Mr. Mulvaney (R. 225).

Four days later, on the morning of January 16, 1975, cab No. 21 was found approximately one-quarter mile off Weaver

Hill Road — a desolate country road in the heavily wooded area of Coventry, Rhode Island. John Mulvaney's body was found in a shallow grave nearby (R. 65, 71, 75).

At the scene, the police found a blue and white blanket (R. 95), Mr. Mulvaney's wallet, and some personal papers (R. 100, 105, 109). The testimony did not reveal what the wallet contained other than personal papers. Mr. Corcelli testified that Mr. Mulvaney should have collected 21 or 22 dollars in fares prior to picking up Thomas Innis (R. 224), and that Mulvaney normally carried a flashlight, which was not found at the scene (R. 228-230).

At approximately 2:30 A.M. on January 13, 1975, Mr. Paul McQuaid of Conventry had been awakened by someone asking for directions to Weaver Hill Road. Mr. McQuaid testified that he had neither seen nor heard any vehicle approach his home (R. 241, 242, 244). He identified Innis as the person he saw that night (R. 239), and testified that Innis was carrying a flashlight similar in appearance to that carried by the victim (R. 236, 237).

At 4:00 A.M. the defendant next appeared at the home of Crawford A. Calder, Jr., located approximately one-quarter of a mile from the scene of the homicide (R. 250). The respondent told him that his car had broken down on Route 95. The respondent spent the remainder of the night there. The following morning Innis brought out a loaded sawed-off shotgun and showed it to Mr. Calder (R. 253). It was cut off at the stock and barrel with scoring marks on the side (R. 259). Mr. Calder was able to identify the gun at the trial (R. 409). The defendant gave him a flashlight and asked him to get rid of it (R. 251, 412). He identified it at trial (R. 413, 414). Mr. Calder was unable to melt it and at the suggestion of another friend contacted the police (R. 420).

Sometime during the early morning hours of January 13, 1975, Thomas Innis placed a call to the home of George Hull.

Priscilla Johnson, Hull's girlfriend, answered. Ms. Johnson testified that Innis told her that he had "to off that dude," which Ms. Johnson interpreted to mean that Thomas Innis "had to kill someone" (R. 271, 273). George Hull came to the phone and Innis asked him for a ride to Providence from Coventry (R. 285). When asked how he got to Coventry the respondent answered that he traveled by cab (R. 285). Hull also testified that Innis told him that the cab driver was giving the respondent some sort of problem and so he had "to dump him" (R. 286).

At approximately 4:30 A.M. on January 17, 1975, the respondent was apprehended on Chalkstone Avenue.

The respondent produced a witness from the phone company who testified that there were no outdoor phones within two or three miles of Weaver Hill Road (R. 488). A second witness testified that in the early morning of January 17, 1975, someone knocked on his door at 1624 Chalkstone Avenue in Providence and asked to call the police (R. 491). Another witness stated that George Hull had told him that he was testifying against Thomas Innis because the police were pressuring him (R. 496), and a final witness testified to the circumstances of an argument he observed between the defendant and George Hull (R. 500-501).

Conclusion.

For the reasons stated above, the State respectfully requests that the judgment of the Supreme Court of Rhode Island be reversed.

Respectfully submitted,

DENNIS J. ROBERTS, II,
Attorney General,
NANCY MARKS RAHMES,
Special Assistant Attorney General,
Chief, Criminal Appellate Division,
Providence County Courthouse,
Providence, Rhode Island 02903.

In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-1076.

STATE OF RHODE ISLAND,
PETITIONER,

v.

THOMAS J. INNIS,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND.

Brief of the Respondent.

WILLIAM F. REILLY,
Public Defender,
JOHN A. MACFADYEN, III,
Assistant Public Defender,
Appellate Division,
Office of the Public Defender,
250 Benefit Street,
Providence, Rhode Island 02903.

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

Table of Contents.

Table of Authorities Cited.

CASES.

CONSTITUTIONAL AND STATUTORY PROVISIONS.

PROCEDURAL RULES.

OTHER AUTHORITIES.

In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-1076.

STATE OF RHODE ISLAND,
PETITIONER,

v.

THOMAS J. INNIS,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND.

Brief of the Respondent.

Opinion Below.

The opinion of the Supreme Court of Rhode Island is reported at 391 A. 2d 1158 (1978).

Jurisdiction.

The respondent agrees with the statement of jurisdiction as it appears in the brief for the petitioner.

Question Presented.

Whether the Supreme Court of Rhode Island correctly applied proper federal constitutional standards to an incomplete and ambiguous record when it concluded that the admissions of the respondent, his conduct in leading the police to an item of contraband and the contraband itself should be excluded from evidence.

Constitutional Provisions Involved.

The respondent agrees with the denotation of constitutional provisions appearing in the brief for the petitioner (the Fifth and Fourteenth Amendments to the Constitution of the United States).

Statement of the Case.

Prior Proceedings.

On March 20, 1975, a grand jury returned indictment No. 75-8 against Thomas J. Innis (hereinafter the respondent) charging him with the crimes of kidnapping, robbery, and

murder. Trial upon the indictment began on October 31, 1975. Before the impanelling of the jury, the respondent made several oral motions to the trial court (App. 3-4). One of these motions was the subject of an in-chambers conference. This motion urged the suppression of evidence arising out of the seizure of a shotgun that was found with the aid of the respondent (App. 4). The trial judge and counsel agreed to conduct the suppression hearing at the appropriate time during the trial (App. 5).

On November 7, 1975, the jury was sent out of the courtroom and a voir dire was conducted on the respondent's motion to suppress (App. 8). At the conclusion of the voir dire, the trial judge denied the respondent's motion (App. 11-61, 63). The respondent's exception was noted (App. 63). The State then proceeded to introduce evidence describing the circumstances surrounding the seizure of the shotgun through the testimony of two police officers, Lovell and Gleckman (App. 64-73).

On November 12, 1975, Thomas J. Innis was found guilty of kidnapping, robbery, and murder in the first degree, in violation of R.I. G.L. (1969 Reenactment) §§ 11-26-1, 11-39-1, 11-23-1, respectively. On November 25, 1975, he was sentenced to life imprisonment on the murder, to thirty years on the robbery and to twenty years on the kidnapping. These sentences were to run concurrently with a sixteen-year sentence on unrelated charges which the respondent had begun serving in January of 1975 (App. 75-76).

On appeal the respondent raised seven issues. Five of these issues were not reached by the court, including both a claim that the respondent's right to counsel under the Sixth Amendment to the United States Constitution had been effectively denied and a claim that the motion to suppress should have been granted under R.I. Const. Art. 1, § 13. Instead, relying primarily on the Fifth Amendment to the United States Con-

stitution, this Court's holding in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and a number of Rhode Island decisions construing *Miranda*, the court concluded that Officer Gleckman had impermissibly attempted to elicit incriminating information from the respondent immediately after Mr. Innis had invoked his right to counsel, that the respondent's inculpatory response was the product of "subtle compulsion," and that discovery of the shotgun was the direct product of these illegal endeavors. The court held that the shotgun and the statements leading to its discovery were improperly admitted. It sustained the respondent's appeal on this ground and remanded the case for a new trial.[1] *State of Rhode Island* v. *Thomas J. Innis*, ____ R.I. ____, 391 A. 2d 1158 (1978).

On November 16, 1978, the State filed a motion for reargument out of time in the Rhode Island Supreme Court. The respondent cross-petitioned for reargument, requesting that the court reach the issues that were unresolved by the court's original decision. On December 21, 1978, the Rhode Island Supreme Court denied the motions for reargument out of time.

The State then filed a petition for a writ of certiorari to this court, which was granted on February 26, 1979. *Rhode Island* v. *Innis*, ____ U.S. ____ (1979).

Statement of Facts.

At approximately 4:30 A.M. on January 17, 1975, the respondent, Thomas Innis, was arrested at gunpoint by Officer Lovell of the Providence police (App. 11; R. 452). In rapid succession the respondent was handcuffed, searched, advised

[1] The Supreme Court of Rhode Island also ruled that a defendant may not be convicted both of first degree felony murder and of the underlying felony. The State does not seek review of this holding.

of his constitutional rights, and placed in a patrol car (App. 13, 17). Within minutes, approximately twelve other officers were on the scene, one of whom, Sergeant Sears, again advised the respondent of his constitutional rights while seated beside him in the rear of the car (App. 29, 31). When Captain Leyden arrived the respondent was outside the vehicle, being held by Officer Lovell and Sergeant Sears, and surrounded by a total of four officers (App. 37, 49). Captain Leyden advised him of his constitutional rights, and the respondent stated that he wanted an attorney (App. 35). Officers Gleckman, McKenna, and Williams all heard the respondent make this request (App. 42, 50, 58). Captain Leyden then directed that the respondent be placed in the "caged wagon,"[2] and that he be taken to the central station (App. 35). He was placed in the vehicle and the doors were closed (App. 55). Captain Leyden ordered a third person, Officer Gleckman, to accompany Officers Williams and McKenna, who were assigned to the wagon (App. 55-56). Captain Leyden further directed that the officers were not to question the respondent or intimidate or coerce him in any way (App. 46). The three officers then entered the vehicle, and it departed.

The wagon proceeded in a westerly direction, going "out" of the city (App. 45, 52, 60). It traveled approximately a mile, the trip encompassing from three to five minutes (App. 45, 52, 59; R. 452). During this period, Officer Gleckman initiated a conversation with his fellow officers[3]:

> A. At this point, I was talking back and forth with Patrolman McKenna stating that I frequent this area while

[2] A "caged wagon" is a four-door sedan, distinctive only in that it has a wire mesh screen between the front and rear seats (App. 46, 51).

[3] While there is conflicting testimony about the exact seating arrangements in the vehicle, it is abundantly clear that all the passengers heard what transpired (App. 46, 50, 52).

> on patrol and there's a lot of handicapped children running around this area, and God forbid one of them might find a weapon with shells and they might hurt themselves. (App. 43-44.)

Officer McKenna apparently shared his brother officer's apprehension:

> A. I more or less concurred with him [Gleckman] that it was a safety factor and that we should, you know, continue to search for the weapon and try to find it. (App. 53.)

While Officer Williams said nothing, he recalled with specificity certain details of the conversation

> A. He [Gleckman] said it would be too bad if the little — I believe he said a girl — would pick up the gun, maybe kill herself. (App. 59.)

As the conversation proceeded, the respondent interrupted, exclaiming that he would show them where the gun was located (App. 58). Officer McKenna immediately radioed back to Captain Leyden that they were returning to the scene and that the respondent would show them where the gun was (App. 44, 50, 59).

At the scene the officers reiterated that the respondent "wanted to show them where the gun was because he didn't want anybody — any kids up there to get hurt" (App. 22). The respondent was again advised of his constitutional rights, to which he responded that "[h]e wanted to get the gun out of the way because of the kids in the area in the school" (App. 39).

The respondent was then placed back in the wagon which then led a parade of police cars up the hill to where Mr. Innis

had indicated the shotgun would be found (App. 23, 39). The respondent, still handcuffed and being held by Officer Gleckman, began searching for the weapon (App. 72). Captain Leyden ordered the numerous officers still present to position their vehicles so that the headlights could illuminate the area in which the respondent was searching (App. 39-40, 72). After a false start, the respondent located the weapon (App. 45).

Summary of Argument.

This case presents the issue of the admissibility in the State's case-in-chief of police testimony recounting certain incriminating statements made by the respondent while in police custody. This testimony also described an incriminating course of conduct as the respondent led the police to an item of contraband. Only secondarily does it involve the issue of the admissibility of that contraband.

The fundamental dispute between the parties is primarily factual, not legal, in nature. The petitioner objects, not so much to the standards employed by the Supreme Court of Rhode Island, but to the conclusions reached after an application of these standards to an incomplete and ambiguous record. The respondent had been given the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and he had requested to see an attorney. Immediately thereafter he was subjected to comments which the Supreme Court of Rhode Island found to be "subtly compelling." The court held that this was "not a case where a defendant voluntarily confesses to a crime or admits to incriminating evidence on his own." *State* v. *Innis*, ____ R.I. ____, 391 A. 2d 1158, 1163 (1978). It then concluded that the officers' remarks were tantamount to interrogation, and, eschewing an application of *Miranda's per se* rule of exclusion, it found that the record did not show that the

respondent had waived his previously invoked protections. In regard to the tangible evidence located under the direction of the respondent, the court found that it should have been suppressed as a product of the compelling remarks or alternatively as a fruit of the prior illegality.

The respondent argues that the evocative comments of the Providence police immediately following his request for counsel constituted interrogation within the meaning of *Miranda*. Interrogation cannot be limited to sentences which end with questions marks. *Miranda* was intended to counterbalance any inducement to confess offered by the police to a suspect in custody, when that inducement augments the pressures already inherent in the custodial setting. The nature and form of any additional inducement or pressure should be irrelevant to the operation of *Miranda*, so long as it is in fact likely to elicit an incriminating response. The petitioner does not quarrel with this flexible and ultimately objective approach, but instead argues that the conclusion of the Supreme Court of Rhode Island that Innis was subtly compelled and therefore interrogated finds no support in the trial record. The respondent suggests that this issue is primarily one for state court resolution and that the record fully supports the conclusion reached by the court below.

The respondent asserts that the conduct of the police in the present case violated the *Miranda* mandate in two respects: first, that the arresting officers did not scrupulously honor the respondent's invocation of his right to counsel, and, second, that they induced incriminating responses without first gaining a voluntary waiver of his constitutional protections. Even if the comments of the police did not meet a technical definition of interrogation, the respondent argues that the police did not honor his exercise of the right to counsel where they made him privy to remarks likely to induce an inculpatory response immediately on the heels of his invocation of that right. The

fact that the respondent was again warned of his constitutional protections after the officers had already gained an incriminating agreement to lead them to the tangible evidence could not, and did not, cure the initial violation of the *Miranda* rule. The testimony describing his immediately ensuing conduct is therefore inadmissible.

The respondent also argues that the Supreme Court of Rhode Island was clearly correct in concluding that no waiver occurred when the respondent first agreed to lead the officers to the shotgun. Nor does the record support a finding of waiver when, several minutes later, the respondent was rewarned and he consummated his previous agreement. The cat was out of the bag, and the respondent's custodial circumstances had not materially changed. Having once under pressure both admitted his knowledge of the shotgun and agreed to lead the police to it, he could not, only minutes later, before the same officers, disavow his willingness to divulge the secret of its location.

The respondent suggests that the shotgun was only the end product of a sequence of inculpatory events. Not only should the respondent's statements and the testimony of his actions have been suppressed at trial, but the shotgun itself should have been excluded as a violation either of *Miranda's per se* rule or of its waiver requirements. It should be noted, however, that it is the evidence linking the respondent to the shotgun and not the shotgun itself that is really at issue here. If the Supreme Court of Rhode Island was correct in excluding the testimony of the police officers, this Court need not even reach the question whether the shotgun itself should have been suppressed.

Assuming, however, that the shotgun should be treated separately from the other evidence admitted against the respondent, part II of the respondent's brief argues that the Supreme Court of Rhode Island was correct in applying a fruits analysis,

given the peculiar circumstances of this case. The court found that the respondent had been subjected to "subtle compulsion" and that he had not voluntarily offered to lead the police to the weapon. Where this compulsion served to negate the respondent's exercise of the crucial protections afforded by counsel, his privilege against compelled self-incrimination was violated, and not merely his rights under the prophylactic rules mandated by *Miranda*. The Fifth Amendment and the deterrent purposes of the fruits exclusionary rule developed in the Fourth Amendment area require suppression of the tangible evidence seized in the present case.

In the alternative, even if the police conduct did not violate the privilege itself, application of the fruits doctrine is appropriate given the factual context of this case and the nature of the *Miranda* violation which produced the tangible evidence. In sharp contrast to *Michigan* v. *Tucker*, 417 U.S. 433 (1974), this case is not one where the police acted in complete good faith. While the officer in charge of the investigation complied with the *Miranda* mandate that interrogation must cease upon a request for counsel, his subordinates, in blatant contravention of both his orders and the law, utilized a psychological ploy to induce an inculpatory response only minutes after the respondent had invoked his right to counsel. Nor was the shotgun an unanticipated fruit of a general police search for information; from the first, it was the precise objective of their endeavors. The deterrence rationale of the fruits cases is thus peculiarly appropriate in the present case. Without reaching the broad question whether the tangible fruits of all *Miranda* violations occurring after the date of the *Miranda* decision should be suppressed, this Court should hold that the shotgun was properly suppressed as a fruit of the poisonous tree.

Argument.

I. The Supreme Court of Rhode Island was Correct in Concluding that the Evidence Relating to the Finding of the Shotgun was Obtained in Violation of the Holding in Miranda v. Arizona, 384 U.S. 436 (1966), and in Violation of the Fifth Amendment to the Constitution of the United States.

The Fifth Amendment to the Constitution of the United States provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . .." In *Malloy* v. *Hogan*, 378 U.S. 1 (1964), this Court held the privilege against compelled self-incrimination applicable to state prosecutions, thereby insuring the right of every person accused of crime "to remain silent unless he chooses to speak in the unfettered exercise of his own will . . .." *Id.* at 8. Two years later, *Miranda* v. *Arizona*, 384 U.S. 436 (1966), explicitly extended the privilege to persons in police custody but not yet formally charged with a crime.[4] This extension followed much earlier applications of the privilege to activities outside the formal criminal judicial process. *See, e.g.*, *Emspak* v. *United States*, 349 U.S. 190 (1955) (privilege held applicable to legislative proceedings); *McCarthy* v. *Arndstein*, 266 U.S. 34 (1924) (privilege held applicable to civil proceedings); *ICC* v. *Brimson*, 154 U.S. 447 (1894) (privilege held applicable to administrative investigations); *Counselman* v. *Hitchcock*, 142 U.S.

---

[4]Some seventy years earlier, in *Bram* v. *United States*, 168 U.S. 532 (1897), this Court had suggested that the voluntariness of confessions in federal prosecutions should be analyzed under the Fifth Amendment. *See also*, *Shotwell Mfg. Co.* v. *United States*, 371 U.S. 341 (1963); *Wan* v. *United States*, 266 U.S. 1 (1924); *Hardy* v. *United States*, 186 U.S. 224 (1902). *Bram* was obscured, however, by an onslaught of state confession cases which, in the absence of an incorporation doctrine, could only be treated under the Fourteenth Amendment due process clause.

547 (1892) (privilege held applicable to grand jury proceedings). In all of these proceedings, the precise nature of the compulsion was clear; the only issue was the individual's right to refuse to answer.

Stationhouse interrogation, however, posed the contrary problem: The arrestee's right to resist self-incrimination was clear, but the nature and extent of the compulsion, if any, not only varied with each case but was also shielded from judicial ascertainment by the closed door of the interrogation room. *Miranda* thus dealt with a unique threat to the privilege, and, not surprisingly, its solution departed from the traditional method of case-by-case adjudication which had produced more than thirty due process voluntariness cases and an increasing difference in opinion amongst members of the Court as to what police practices so offended the community's sense of fair play as to violate the due process clause. *Compare* the majority and dissenting opinions in *Culombe* v. *Connecticut*, 367 U.S. 568 (1961), and *Haynes* v. *Washington*, 373 U.S. 503 (1963).[5]

[5]Due process voluntariness had its genesis in the common-law distrust of the reliability of confessions extracted through physical torture. *Brown* v. *Mississippi*, 297 U.S. 278 (1936). Through the years, however, the Court's focus changed from the reliability of the evidence obtained to whether the interrogation had deprived the defendant of his "free choice to admit, to deny, or to refuse to answer." *Lisenba* v. *California*, 314 U.S. 219, 241 (1941). Psychological coercion was included within the ambit of the Court's disapproval, despite the absence of any indication that the confessions lacked considerable probative value. *See, e.g., Leyra* v. *Denno*, 347 U.S. 556 (1954); *Watts* v. *Indiana*, 338 U.S. 49 (1949); *Chambers* v. *Florida*, 309 U.S. 227 (1940). Where the accused had been "subjected to pressures to which, under our accusatorial system, an accused should not be subjected," the admission of even a clearly trustworthy confession would require reversal of the conviction. *Rogers* v. *Richmond*, 365 U.S. 534, 541 (1961). By the 1950's the surface simplicity of the voluntariness test had broken to reveal a complex matrix of variables concerning the behavior of the police and the subjective attributes of the suspect. In *Culombe* v. *Connecticut*, *supra*, Mr. Justice Frankfurter filed 67 pages in an attempt to explain why Culombe's confession was involuntary, only to generate a concurrence by two justices and a dissent by three others. Five years later, in *Davis* v. *North Carolina*, 384 U.S. 737 (1966), a uniquely clear record establishing a sixteen-day detention in a purposefully incommunicado setting failed to impress four lower courts before this Court reversed. As Professor Stone has noted, given "the Court's inability to articulate a clear and predictable definition of 'voluntariness,' the apparent persistence of state courts in utilizing the ambiguity of the concept to validate confessions of doubtful constitutionality, and the resultant burden on its own workload, it seemed inevitable that the Court would seek 'some automatic device by which the potential evils of incommunicado interrogation [could] be controlled.'" Stone, *The Miranda Doctrine in the Burger Court*, 1977 Sup. Ct. Rev. 99, 102-103 (1978) (notes omitted).

Miranda begins with a recognition of the myriad ways in which the police may bring pressure to bear upon a suspect once he is taken into custody. *Miranda* v. *Arizona*, *supra*, at 449-456. Chief Justice Warren stressed that "the modern practice of in-custody interrogation is psychologically rather than physically oriented." *Id.* at 448. No particular interrogation technique was singled out for condemnation, as this Court recognized that techniques could and would vary with each interrogation, with each suspect, and with each opinion rendered by the Court which limited the prerogatives of the police. Instead, *Miranda* sought to identify the characteristics common to these techniques and to provide safeguards when these characteristics were evident.

The Court focused on two key attributes of stationhouse interrogation: first, the fact of custody; and second, the fact of a deliberate attempt to elicit information backed up by the apparent authority of the police. Incommunicado custody "carries its own badge of intimidation." *Id.* at 457. The atmosphere itself generates "[t]he potentiality for compulsion . . .." *Id.* at 457. In this context, when an agent of the state, acting in an obviously official capacity, seeks to obtain incriminating evidence, the threat to the privilege is greatly intensified.

> Even without employing brutality, the "third degree" or the specific strategems described above, the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.

Id. at 455 (notes omitted). This Court did not hold that the compulsion produced by arrest and detention is sufficient to require the observance of countervailing safeguards; nor did it outlaw all custodial interrogation. *Miranda* held only that where the police have a suspect in custody and then proceed to prod or persuade him to incriminate himself, the threat to the privilege is constitutionally intolerable unless certain safeguards are observed.

> Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.
>
> . . . . . .
>
> An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.

Id. at 458, 461 (notes omitted). Thus, *Miranda* requires a sympathetic interaction of custody and some *further* official pressure to incriminate oneself before its safeguards become

applicable.[6] Where a suspect is not in fact in custody, the threat to the privilege is sufficiently diminished so as not to demand any particular police procedures. *Oregon* v. *Mathiason*, 429 U.S. 492 (1977); *Beckwith* v. *United States*, 425 U.S. 341 (1976). Conversely, where no additional pressure is put on a suspect in custody and he simply volunteers incriminating information, it will be fully admissible in evidence. *Miranda* v. *Arizona*, *supra*, at 478. Mr. Innis' case falls into neither of these two categories.

A. *The Respondent was Interrogated Within the Meaning of Miranda v. Arizona, supra, While in the Custody of the Police.*

Thomas Innis was arrested at gunpoint at approximately 4:30 A.M. on January 17, 1975 (App. 11; R. 452). He was immediately handcuffed (App. 17), and within minutes he was surrounded by three or four additional policemen (App. 37),

---

[6] Professor Kamisar has summarized the *Miranda* foundation as follows:

> It is this combination of "custody" and "interrogation" that creates — and, in the absence of "adequate protective devices," enables the police to exploit — an "interrogation environment" designed to "subjugate the individual to the will of his examiner." It is this *combination* — more awesome, because of the interplay, than the mere sum of the "custody" and "interrogation" components — that produces the "interrogation atmosphere," "*interrogation* . . . in a *police dominated* atmosphere," that "carries its own badge of intimidation," that "exacts a heavy toll in individual liberty and trades on the weakness of individuals," and that is so "at odds" with the privilege against compelled self-incrimination.

Kamisar, *Brewer* v. *Williams, Massiah, and Miranda: What is Interrogation? When Does it Matter?*, 67 Geo. L. J. 1, 63 (1978) (emphasis original). The respondent is deeply indebted to this illuminating article for much of the content of this section of his brief.

two of whom were holding him by the arms (App. 49); an additional twelve policemen were close by (App. 37). After thrice being given the warnings required by *Miranda* (App. 12-14, 19, 20-21), he requested to see an attorney (App. 35). He was then "placed" in a caged wagon with three police officers (App. 35), who were instructed by their superior not to interrogate or to coerce Mr. Innis in any way during their trip to the stationhouse (App. 46). There is no indication in the record that the respondent could hear these instructions. Shortly thereafter, in response to a number of remarks made by the officers in the wagon, Mr. Innis made a highly incriminating statement.

The petitioner does not suggest that the respondent was not in custody within the meaning of *Miranda* (Petitioner's Brief at 24). It argues instead that this admittedly custodial setting was not coercive (Petitioner's Brief at 24-25). This argument finds no support in the record. The respondent had been abruptly seized in the middle of the night by a number of police officers. His request for counsel had resulted not in an assurance that he could see a lawyer, but in an order to take him to the central station to await the arrival of a member of the police force.

Mr. Justice Powell has termed the back seat of a police vehicle "an inherently coercive setting" which is "conducive to . . . psychological coercion . . .." *Brewer* v. *Williams*, 430 U.S. 387, 413 n.2, 412 (1977) (Powell, J., concurring). The Sixth Circuit Court of Appeals has carefully described the profoundly threatening experience of being taken for a "ride" by the police.

> The prisoner and police officers are in close contact within a confined area. Often, the inside door handles are removed and the front and back seats are separated by wire mesh or a plastic divider. Invariably, the prisoner is handcuffed. He is effectively cut off from the world outside the patrol car. As a practical matter, he has no access to friends or counsel. If the prisoner has just been arrested, he may still be disoriented and apprehensive in an often hostile and alien setting. In short, the back seat of a patrol car as the setting for a confession conforms in all respect[s] to the "incommunicado, policedominated" atmosphere which led the Supreme Court in *Miranda* v. *Arizona*, 384 U.S. 436, 456, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), to recognize the need for special procedures to minimize the inherent coerciveness of custodial interrogation.

United States v. *Brown*, 557 F. 2d 541, 551 (6th Cir. 1977). The petitioner's assertion that the setting was noncoercive cannot be reconciled with the record.

The state's primary argument claims that the remarks of the officers in the squad car were simply off-hand conversation, not intended for the suspect's ears and unlikely to elicit an incriminating response (Petitioner's Brief at 24-25). Officer Gleckman testified that while he did not say anything to the respondent directly or ask him any questions (App. 44), he did initiate a discussion with one of his brother officers regarding the risk to local school children created by the presence of a shotgun.

> I was talking back and forth with Patrolman McKenna stating that I frequent this area while on patrol and there's a lot of handicapped children running around in this area, and God forbid one of them might find a weapon with shells and they might hurt themselves. (App. 43-44.)

Officer McKenna responded by agreeing that a school for the handicapped was in the neighborhood and by noting the critical need to find the shotgun (App. 47, 53). The respondent could clearly hear this entire conversation (App. 46). Officer Williams essentially corroborated this testimony, adding details of the evocative exchange carried on in the front seat.

> He said it would be too bad if the little — I believe he said girl — would pick up the gun, maybe kill herself. (App. 59.)

It is interesting to note the officer's choice of sex to flesh out this scenario. At some point during the officers' conversation, the defendant broke in, saying, "Stop, turn around, I'll show you where it is" (App. 44).

In determining whether this interchange operated as an inducement to speak and consequently as "interrogation" requiring the observance of *Miranda* safeguards, it is crucial to note that the record contains only a synopsis of the words actually spoken. While Officer Gleckman's remarks could not have lasted more than five minutes,[7] there is a significant difference between a few sentences lasting only ten or fifteen seconds and several minutes of intense discussion. The record does not permit a reasoned conclusion as to which in fact occurred. The latter possibility would produce a monologue far more directed and extensive than the "Christian burial" speech condemned in *Brewer* v. *Williams*, *supra*. Moreover, the precise words aside, this case presents in classic form the almost insur-

[7] The officers testified that they had traveled between a half mile and a mile on an urban street before the respondent made his admission (App. 45, 52, 61). Officer Gleckman estimated the elapsed time to be three to five mintues (R. 458-459).

mountable problem of imaginatively recreating the tenor of a custodial "conversation" to take into account "the subtle messages that can be communicated through changes in vocal inflection and nonverbal communication . . .." White, *Police Trickery in Inducing Confessions*, 127 U. Pa. L. Rev. 581, 586 (1979).

The petitioner has suggested that a few off-hand observations by police officers, overheard by a suspect in custody, sent a majority of the Supreme Court of Rhode Island careening off the judicial road to the conclusions of "subtle compulsion." The respondent suggests to the contrary that the majority opinion is predicated on a common sense recognition of the difficulties inherent in ascertaining the precise nature of a police-suspect interaction and on an informed distrust of the abysmally incomplete record created in the present case. The Supreme Court of Rhode Island has had a long history of carefully reviewing the factual basis for a trial court's conclusion that a criminal defendant voluntarily incriminated himself. *See, e.g., State* v. *Nagle*, 25 R.I. 105, 54 Atl. 1063 (1903). The court has demanded that the State prove the voluntariness of a confession by clear and convincing evidence before it will be submitted for a jury's consideration. *State* v. *Knott*, 111 R.I. 241, 260, 302 A. 2d 64, 74 (1973) (Kelleher and Paolino, JJ., concurring); *State* v. *Espinosa*, 109 R.I. 221, 228, 283 A. 2d 465, 468 (1971); *compare Lego* v. *Twomey*, 404 U.S. 477 (1972), setting a federal constitutional standard of mere preponderance. On appeal, the Supreme Court of Rhode Island will in every case "independently examine the facts, findings and the record of the lower court to determine whether the trial justice erred in ruling on the motion to suppress." *State* v. *Sundel*, R.I. Slip Opinion p. 5 (June 12, 1979); *accord*, *State* v. *Smith*, ____ R.I. ____, 396 A. 2d 110, 113 (1979); *State* v. *Espinosa*, *supra*, at 229, 283 A. 2d at 469.

There can be no question that the Rhode Island court performed exactly this function in the *Innis* case; indeed, the factual orientation of the dissent makes very clear that the probable impact of Officer Gleckman's remarks was the subject of intense debate among members of the court prior to its decision. A majority ultimately concluded that these remarks were as a matter of psychological fact subtly compelling and that they produced an incriminating agreement to lead the officers to the weapon. *State* v. *Innis*, ____ R.I. ____, 391 A. 2d 1158, 1162, 1163 (R.I. 1978). Having lost this issue in a state court of last resort, the petitioner is now asking this Court to reverse this factual finding on its own reading of the record, to substitute the conclusion that Officer Gleckman's remarks were not "likely to elicit an incriminating response" under the circumstances, and with this new factual basis to conclude that the Supreme Court of Rhode Island erred as a matter of federal law in holding that Thomas Innis was interrogated within the meaning of *Miranda*.

Perhaps in recognition of the inappropriateness of this argument in a case where no federal constitutional rights have been infringed by the state court's fact finding process,[8] the petitioner in addition suggests that the Supreme Court of Rhode Island misapplied federal standards in its reliance on the recent case of *Brewer* v. *Williams*, *supra*. In essence, the State argues that a violation of the Sixth Amendment may occur in the total absence of any overt police pressure to confess (*Mas-*

[8] The petitioner's argument would be more appropriate if this were a case in which a federal right had been denied. In *Niemotko* v. *Maryland*, 340 U.S. 268, 271 (1951), this Court restated its long standing duty in this area.

> In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded.

This obligation rests upon principles this Court enunciated in *Martin* v. *Hunter's Lessee*, 1 Wheat. 304 (1816), when first justifying its invocation of appellate jurisdiction over the state courts. The requirement of evidentiary review stems from the two purposes for which this review was deemed essential: (1) to safeguard the authority of the federal government in the rightful exercise of its powers, and (2) to safeguard the rights individuals might claim under the authority of the federal government. Thus, the tension which must inevitably exist within a federal system composed of sovereign states defined both the necessity of appellate review and the scope of its invocation. Where, as in the present case, the appellate jurisdiction of this Court over state courts is invoked to review a decision in which a claim under federal authority is upheld, these purposes are not implicated. Moreover, the circumstances surrounding the 1914 amendment to the judiciary act (now 28 U.S.C. § 1257) which authorized review in this Court when a claim of federal right is upheld in a state court indicate a concern not for differing applications of federal rights, but for divergent interpretations of the federal right itself. *See* Dodd, *The United States Supreme Court as Final Interpreter of the Federal Constitution*, 6 Ill. L. Rev. 289 (1911). For a retrospective analysis of the *Lochner* controversy, *see* Felix Frankfurter, *The Business of the Supreme Court of the United States — A Study in the Federal Judicial System*, 39 Harv. L. Rev. 1046, 1049-1057 (1926).

This Court has implicitly observed a different standard of review, emanating from the distinct history and purposes of the 1914 amendment, when dealing with state court decisions upholding a right under federal authority but not involving a redefinition of the right itself. Here, the respect rightfully accorded the state judiciary serves to circumscribe this Court's exercise of its powers and review. Far from substituting one factual conclusion for another, when both are reasonably founded in the evidence, this Court has implicitly established a standard of deference which requires the petitioner to show one of two situations in order to justify reversal: (1) if the state court "held as it did because it felt under compulsion of federal law as enunciated by this Court so to hold, it should be relieved of that compulsion," *Missouri ex. rel. Southern R. Co.* v. *Mayfield*, 340 U.S. 1, 5 (1950); *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977); or (2) if the state court has imposed "greater restrictions as a matter of federal constitutional law when this Court *specifically refrains from imposing them*." *Oregon* v. *Haas*, 420 U.S. 714, 719 (1975) (emphasis supplied); *Fare* v. *Michael C.*, ____ U.S. ____, 25 Cr. L. 3184, 3187 (1979). The petitioner's argument that the Supreme Court of Rhode Island erred in assessing the probable impact of Officer Gleckman's remarks reaches neither of these categories.

siah v. *United States*, 377 U.S. 201 (1964)), and that therefore this Court's discussion of interrogation in *Williams* is irrelevant to the question whether the comments of the Providence police were an inducement to speak above and beyond the compulsion inherent in the arrest. This argument is misplaced for a number of reasons. First, as the Supreme Court of Rhode Island noted in its opinion, Mr. Justice Stewart approved the conclusion reached by the state and lower federal courts that Williams had in effect been interrogated. These decisions were primarily based on *Miranda*, and the majority opinion does not even intimate that they misapplied the case. Second, the issue in *Williams*, unlike *Massiah*, was "whether there had been a voluntary waiver, and this turns in large part upon whether there was interrogation." *Brewer* v. *Williams*, *supra*, at 410 (Powell, J., concurring). Psychological pressure from the police will vitiate a Sixth Amendment waiver. *Id.* at 412 (Powell, J., concurring). Similarly, it will trigger the protections of *Miranda*. In both cases the issue is the same: the presence or absence of subtle coercion.

The opinion of the Supreme Court of Rhode Island carefully denoted the issues before it as Fifth Amendment issues; moreover it explicitly recognized *Williams* to be a Sixth Amendment case. It did not find the facts of *Williams* controlling, as the State suggests, but rather illustrative insofar as both cases presented a problem of psychological coercion. The majority concluded that the respondent had been interrogated, within the meaning of *Miranda*, not because it utilized a Sixth Amendment legal standard in a Fifth Amendment case, but because it found as a matter of psychological fact that Innis had been subjected to "subtle compulsion."

Thomas Innis was exposed to Officer Gleckman's highly emotive comments within minutes of his arrest and his request for the assistance of counsel. The pressures inherent in his situation were far greater than those present in *Brewer* v.

Williams, *supra*. Unlike Williams, he had not actually spoken with counsel; unlike Williams, he had received no indication that he would be permitted to see counsel at any time in the near future; and, unlike Williams, he had not sat with an apparently friendly or at least neutral police officer for an extended period of time without mishap. Instead, immediately after a gunpoint arrest, he was placed in a tightly enclosed space with three police officers.[9] Although bound for the central station, the wagon was apparently traveling directly away from the center of Providence during the crucial few minutes (App. 60).[10] From the respondent's point of view, he was heading off into the darkness without any indication of his ultimate destination. Almost instantly, he was forced to listen to remarks which, as the interrogation manuals instruct,[11] displayed full confidence that the shotgun was in fact near the scene of the arrest and by necessary implication that Innis had placed it there. The officers' conversation conjured up a

---

[9] Professor Driver has explicated the psychological impact of close-quarters interrogation.

> [T]o be physically close is to be psychologically close. The situation has a structure emphasizing to the persons involved the immediacy of their contact . . .. When the norm governing spatial distance is violated, a person's instantaneous and automatic response is to back up, again and again. The suspect, unable to escape, will become even more anxious and unsure.

Driver, *Confessions and the Social Psychology of Coercion*, 82 Harv. L. Rev. 42, 44-46 (1968).

[10] Officer Williams was certain that Innis made his admission prior to reaching the intersection where the wagon would turn back into the city (App. 60). The other two officers testified they made the turn back toward the city, but were not asked specifically where they were when the respondent agreed to take them to the shotgun (App. 45, 52).

[11] *See*, Inbau and Reid, *Criminal Interrogation and Confessions* 26 (2d ed. 1967).

highly speculative tragedy, replete with such evocative detail as the sex of the soon-to-be victim (App. 59). The person they would hold responsible was no less obvious for remaining unstated. Officer McKenna did not respond to Gleckman by suggesting that they cordon off the area or that they notify the school officials. He emphasized what was already implicit in his brother officer's comments: they had to find the weapon to avert a child's death (App. 53). In effect, the officers staged a morality play which challenged its audience to display a humanitarian and necessarily incriminating response to a life-threatening situation.

Appeals to the conscience of the suspect form the heart of a number of interrogational techniques. *See, e.g.*, O'Hara, *Fundamentals of Criminal Investigation*, 102-103 (1st ed. 1956), quoted extensively by this Court in *Miranda* v. *Arizona*, *supra*, at 449-453. The subject should be challenged "to display some evidence of decency and honor." Inbau and Reid, *supra*, at 61. Preferably, the interrogating officer should focus on a detail of the offense and avoid expressing interest in the crime as a whole. *Id.* at 79-82. At all times he should convey confidence in the suspect's guilt. *Id.* at 26. Officer Gleckman's remarks fitted these specifications, and they certainly produced an incriminating response.

The petitioner suggests that there is no *Miranda* interrogation where custodial comments are "*neither* intended *nor* likely to compel incriminating responses" from the accused (Petitioner's Brief at 21) (emphasis supplied), and that *Innis* meets both prongs of this test. The respondent believes that it satisfies neither.

The trial record is absolutely silent on the question of subjective intent; the officers did not testify that they never intended to elicit the location of the shotgun from the respondent. The trial court implied, but did not definitively state, that the police were merely expressing their natural concern

for the safety of others (App. 62). The Supreme Court of Rhode Island implied, but did not state, that the officers' comments were a deliberately calculated ploy. *State* v. *Innis*, *supra*, at 1162. In the absence of testimony on this point, the question of intent did not turn on the credibility of the suppression witnesses, an issue for trial court resolution, but on the drawing of inferences from largely undisputed if somewhat sketchy facts. The respondent suggests that the circumstances and tenor of the remarks indicate deliberateness, and that, in any event, given the importance of the rights at stake, the ambiguity must be resolved against the state. *Cf. Addington* v. *Texas*, ___ U.S. ___, 99 S. Ct. 1804 (1979).

The petitioner's two-part test follows the lead of other courts which have held that *Miranda* interrogation encompasses any "police conduct . . . 'expected to, or likely to, evoke admissions.'"[12] *United States* v. *Lewis*, 425 F. Supp. 1166, 1176 (D. Conn. 1977); *accord*, *Santos* v. *Bayley*, 400 F. Supp. 784, 795 (M.D. Pa. 1975); *Commonwealth* v. *Simala*, 434 Pa. 219, 226, 252 A. 2d 575, 578 (1969); *cf. United States* v. *Vasquez*, 476 F. 2d 730 (5th Cir. 1973), *cert. den.* 414 U.S. 836 (1973). A purely subjective standard would create an evidentiary morass on an issue only indirectly related to the ultimate issue of voluntariness. Moreover, it would include within the purview of *Miranda* precisely those situations which the petitioner argues fall within the Sixth Amendment but outside the Fifth. These situations are typified by the *Massiah* case where the subject did not know he was speaking with an agent and

[12] Oregon has concluded that *Miranda* interrogation "is not limited to direct inquisitorial repartee, it includes the various approaches police have available to obtain an incriminating statement." *State* v. *Johnson*, 37 Or. App. 209, 213, 586 P. 2d 811, 814 (1978). The term encompasses "all police action which is designed to elicit statements from a defendant in custody, including acts of inducement or persuasion." *State* v. *Turner*, 32 Or. App. 61, ___, 573 P. 2d 326, 327 (1978).

consequently felt no offical pressure to incriminate himself, but where the police were certainly seeking an admission to illegal activity (Petitioner's Brief at 18-19); *see generally* Kamisar, *supra*, for a full exposition of the argument that *Miranda* applies only where the suspect is subjected to overt inducements to speak.

In concluding that *Miranda's* custody requirement demands an objective test, Justice Friendly has noted that

> a standard hinging on the inner intentions of the police would fail to recognize *Miranda's* concern with the coercive effect of the "atmosphere" from the point of view of the person being questioned.

United States v. *Hall*, 421 F. 2d 540, 544 (2d Cir. 1969), *cert. den.* 397 U.S. 990 (1970).[13] Interrogation as well must turn on the impact of the police conduct on the suspect.

> [S]o long as the police conduct is likely to elicit incriminating statements and thus endanger the privilege, it is police "interrogation" *regardless of its primary purpose or motivation*, and that if it otherwise qualifies as "interrogation", *it does not become else* because the interrogator's main purpose is the saving of a life rather than the procuring of incriminating statements, even though self-incrimination may be foreseen as a windfall.

Kamisar, *supra*, at 9 (emphasis original).

[13] This Court has implied that an objective, reasonable person standard is appropriate for a determination of *Miranda* custody. *See Beckwith* v. *United States*, 425 U.S. 341 (1976); *Oregon* v. *Mathiason*, 429 U.S. 492 (1977); *Orozco* v. *Texas*, 394 U.S. 324 (1969); *Mathis* v. *United States*, 391 U.S. 1 (1968). Most lower courts which have explicitly considered the issue have adopted this test. *See Hunter* v. *State*, 590 P. 2d 888 (Alas. 1979), and cases cited therein.

The respondent suggests that *Williams* would not have been a different case if Captain Leaming had really wanted to see Pamela Powers decently buried.[14] His remarks would still have vitiated any purported waiver, their intent notwithstanding. Officer Gleckman's comments, even if an innocent intent can be assumed from a skeletal record, nevertheless posed a threat to the privilege, and were no less interrogation for the petitioner's speculations about their motivation.

The petitioner concedes that *Miranda* interrogation "need not be in the form of a question . . ." (Petitioner's Brief at 22). *See, e.g., Combs* v. *Wingo*, 465 F. 2d 96 (6th Cir. 1972).[15] *Miranda* itself catalogues a number of psychological ploys, all sufficiently coercive to trigger the opinion's protections, some of which would amount to Fifth Amendment compulsion, and none of which require the use of direct questions. *Miranda* v. *Arizona*, *supra*, at 450-455. Nor do these techniques demand that the suspect be personally addressed.[16] Indeed, several of

[14] It should be noted that this Court's due process voluntariness cases have never distinguished between a coercive action for a non-incriminatory purpose and one intended to produce an incriminating response. *See, e.g., Jackson* v. *Denno*, 378 U.S. 368 (1964) (water withheld from thirsty suspect for medical reasons).

[15] The Supreme Court of Rhode Island under its own Constitution has long recognized that attempts to elicit information from suspects in custody, not involving direct questioning, may pass permissible bounds. *See State* v. *Travis*, 111 R.I. 678, 360 A. 2d 548 (1976) (finding a violation of the privilege under both the State and Federal Constitutions in a jail plant case where the undercover agent asked no direct questions but instead induced an incriminating statement shortly after the suspect had requested to see an attorney); *State* v. *Nagle*, *supra* (finding an admission to be compelled under traditional standards where defendant, being transported to prison, was told that she should tell the truth and that the police knew she had been lying).

[16] *Miranda* quotes the following two monologues taken from Inbau and Reid, *Criminal Interrogation and Confessions*, 40, 111 (1st ed. 1962), as highly successful psychological ploys:

> "Joe, you probably didn't go out looking for this fellow with the purpose of shooting him. My guess is, however, that you expected some-

thing from him and that's why you carried a gun — for your own protection. You knew him for what he was, no good. Then when you met him he probably started using foul, abusive language and he gave some indication that he was about to pull a gun on you, and that's when you had to act to save your own life. That's about it, isn't it, Joe?"

. . . . . .

"Joe, you have a right to remain silent. That's your privilege and I'm the last person in the world who'll try to take it away from you. If that's the way you want to leave this, O.K. But let me ask you this. Suppose you were in my shoes and I were in yours and you called me in to ask me about this and I told you, 'I don't want to answer any of your questions.' You'd think I had something to hide, and you'd probably be right in thinking that. That's exactly what I'll have to think about you, and so will everybody else. So let's sit here and talk this whole thing over."

Miranda v. *Arizona*, *supra*, at 451-452, 454. It is patently obvious that the last sentence of each of these two ploys could be omitted, while the interrogator simply waited for a "volunteered" response. Moreover, they could be rewritten with an additional character in the script to avoid any direct statement to the subject:

Policeman A trying to placate Policeman B in presence of suspect:

"Now Sam, Joe probably didn't go out looking for this fellow with the purpose of shooting him. My guess is, however, that Joe expected something from him and that's why he carried a gun — for his own protection. He knew him for what he was, no good. Then when Joe met him he probably started using foul, abusive language and he gave some indication he was about to pull a gun on him, and that's when Joe had to act to save his own life."

Policeman B refusing to be placated by Policeman A in the presence of a suspect:

"He may have a right to remain silent. That's his privilege and I'm the last person in the world who'll try to take it away from him. If

these ploys, the false lineup and the reverse lineup,[17] require no verbal conduct by the police whatsoever, yet they are surely as coercive, and probably more coercive, than simple questioning. *Id.* at 453.

Prior confession cases have never recognized a principled distinction between questions from an agent of the state and coercive statements made to or in the presence of a suspect. In *Bram* v. *United States*, *supra*, a suspect, informed by the police of a codefendant's confession, made a damaging admission without ever being asked a question. This Court found a violation of the privilege where the information "produce[d] upon his mind the fear that if he remained silent it would be considered an admission of guilt . . .." *Bram* v. *United States*, *supra*, at 562. In *Ashcraft* v. *Tennessee*, 322 U.S. 143 (1944), the defendant admitted his guilt only after his codefendant's confession was given or read to him. In *Rogers* v. *Richmond*, 365 U.S. 534 (1961), a confession was obtained after the police had indicated in the suspect's presence that they were about to take his wife into custody. Not only were no questions asked of the suspect at this juncture, but the coercive statement was at least ostensibly addressed to a third party. Similarly in *Lynumn* v. *Illinois*, 372 U.S. 528 (1963), the police obtained a confession by threatening the suspect with the loss of her children. How many actual questions were asked is unclear.

that's the way you want to leave this, O.K. But Harry, let me ask you this. Suppose I was in his shoes and you called me in to ask me about this and I told you, 'I don't want to answer any of your questions,' you'd think I had something to hide, and you'd probably be right in thinking that. That's exactly what I have to think about him, and so will everybody else."

[17] *Miranda* defines a false lineup as one where the suspect is identified by a previously coached witness and a reverse lineup as one where he is identified as the perpetrator of crimes which he clearly did not commit. *Miranda* v. *Arizona*, *supra*, at 453.

Lynumn would hardly have been a different case if one officer had said to another, "Well, if she won't cooperate, I guess Child Welfare will have to take her kids." It was in light of this long history of pragmatic consideration of custodial pressure that a majority of this Court categorized the "Christian burial" speech of *Brewer* v. *Williams*, *supra*, as a species of interrogation.

These cases, excepting only *Williams*, were all decided under the less stringent standard of due process voluntariness, and all of them held that the police conduct described above, although not in classic question and answer form, contributed to the coercion which produced confessions later found to be involuntary. *Miranda* applied the privilege to custodial settings to impose "more exacting restrictions than [did] the Fourteenth Amendment's voluntariness test." *Miranda* v. *Arizona*, *supra*, at 511 (Harlan, J., with Stewart and White, JJ., dissenting). As Professor Kamisar has noted, "[i]t would be standing *Miranda* on its head to say that because the Court was 'concern[ed] . . . primarily with [the] interrogation atmosphere and the evils it can bring,' it somehow managed to *lift* restrictions against other forms of compulsion, persuasion, trickery, and cajolery." Kamisar, *supra*, at 18 (emphasis original).

Miranda recognized that "there are a thousand forms of compulsion" and that "our police show great ingenuity in the variety employed." Hopkins, *Our Lawless Police*, 194 n.103 (1931). This Court sought to provide countervailing safeguards when police conduct augments the pressure to confess inherent in the arrest. The opinion's use of the terms "interrogation" and "questioning" must be interpreted in light of this purpose, and not by a dictionary definition divorced from the reality of the methods used to extract information from suspects in custody. A restrictive definition of *Miranda* interrogation would invite the police to place in an interrogation

room two officers whose conversation would have the same coercive effect as a single officer's statement to the suspect or a direct question; it would "place a premium on the ingenuity of the police to devise methods of indirect interrogation, rather than to implement the plain mandate of *Miranda* . . .." *Commonwealth* v. *Hamilton*, 445 Pa. 292, 297, 285 A. 2d 172, 175 (1971). This ingenuity in turn will produce endless litigation. As Mr. Justice Jackson observed in a Fourth Amendment context, "officers interpret and apply themselves and will push to the limit" the doctrines of this Court. *Brinegar* v. *United States*, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting).

If such indirect pressure does not come within *Miranda's* ambit, the police need not give a suspect any warnings whatsoever before they seek incriminating information, providing that they watch their grammar and avoid the direct question.[18] When a slip is made, either at the station or on the witness stand, and a policeman admits to using the abhorrent interrogative, this Court will be called upon to distinguish his conduct from the potentially far more coercive conduct of his peers and condemn it. Such a result is insupportable and is possible only if this Court allows the reality of custodial interrogation to submit to a mere form of words. *Cf. Di Santo* v. *Pennsylvania*, 273 U.S. 34, 43 (1927) (Brandeis, J., with Holmes, J., dissenting).

---

[18] Professor Kamisar has identified succinctly this corollary to a restrictive reading of *Miranda* interrogation:

> Furthermore, if these tactics may be resorted to after a suspect has asserted his rights, it would seem to follow that they are permissible a fortiori before he has asserted them. To put it another way, if these tactics do not amount to "interrogation" within the meaning of *Miranda*, then why can they not be employed to "talk a suspect into confessing" without ever advising him of his *Miranda* rights?

Kamisar, *supra*, at 20 n.115.

B. *Interrogation of the Respondent Immediately Following his Request for Counsel and in the Absence of a Voluntary Waiver Violated the Holding in Miranda v. Arizona, supra, and the Fifth Amendment to the Constitution of the United States.*

This Court in *Miranda* v. *Arizona, supra,* did not proscribe all custodial interrogation, but rather merely regulated it: this Court specified a constitutional minimum of information which must be given to a criminal suspect, and the Court required that the police afford the suspect an unrestricted opportunity to make use of this information. Thus, a suspect must be informed of his constitutional protections prior to any interrogation, and he must be permitted to exercise them freely throughout his custodial interaction with the police. *Miranda* v. *Arizona, supra,* at 479. To enforce this free exercise of fundamental constitutional rights in an inherently hostile setting, *Miranda* demanded that the state bear the heavy burden of demonstrating a *Johnson* v. *Zerbst*[19] waiver whenever it seeks to introduce admissions elicited by custodial interrogation. *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 240 (1973). In addition, where the suspect invokes the right to counsel,

> the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.

Miranda v. *Arizona, supra,* at 474.

[19] *Johnson* v. *Zerbst,* 304 U.S. 458 (1938).

These two protections co-exist where the assistance of counsel has been requested, but they focus on different aspects of the police-suspect interaction. The question of waiver ultimately turns on the state of mind of the accused, although the presence or absence of waiver may be inferred from the external facts of the custodial situation. The requirement that all interrogation cease upon a request for counsel, however, is a prophylactic requirement focusing on the conduct of the interrogators, regardless of the voluntariness of any ensuing statement. *Fare* v. *Michael C., supra,* at 3187. Recognizing the evidentiary problems inherent in determining the voluntariness of waivers elicited behind closed doors, this Court set objective guidelines for the police to follow once a suspect asks to see an attorney. In general, the police must "scrupulously honor" the invocation of the right (*Michigan* v. *Mosley,* 423 U.S. 96 (1975)), and at a bare minimum they must immediately cease for some period of time their attempts to gain incriminating information from the suspect.[20]

[20] The respondent has taken the position that the police deliberately elicited an incriminating response from him. *See* part I(A), p. 25, *supra.* It should be noted, however, that even if they simply acted negligently in uttering remarks likely to induce admissions, they nevertheless violated the *Miranda* rule. *Miranda* and *Mosley* did not merely require that the police in subjective good faith accede to a request for counsel but that the request be "scrupulously honored." The purpose of the rule is to protect the unique role of counsel in our adversary system of justice. *Fare* v. *Michael C., supra,* at 3187. This protection would devolve into a one-sided swearing match if a claim of subjective good faith were to be allowed to defeat the operation of the prophylaxis. Moreover, to the degree that the "scrupulous regard" requirement is based on a need to deter future police misconduct through the exclusion of evidence, this rationale is not directed toward Officer Gleckman in particular, but toward all officers who may be tempted to discuss in evocative terms the suspect's case while he is present.

> The justification of the exclusion of evidence obtained by improper methods is to motivate the law enforcement profession as a whole — not the aberrant individual officer — to adopt and enforce regular pro-

Both the petition for writ of certiorari and the brief of amicus curiae in support of petitioner allege that the Supreme Court of Rhode Island relied on a rigid *per se* interpretation of *Miranda* to hold that when a suspect in custody asserts his right to counsel it becomes legally impossible for him to waive this right until he has consulted with counsel (Brief of Amicus Curiae in Support of Petitioner at 5; Petition for Writ of Certiorari at 8). The facts of *Innis*, however, do not present this issue; nor did the Supreme Court of Rhode Island undertake to decide it. On the contrary, in passing on the admissibility of Innis' initial incriminating response in the police wagon, the majority eschewed any reliance whatsoever on *Miranda's* prophylactic protections and concluded, not that the respondent was legally incapable of waiving his right to counsel, but only, on the record created below, that he had not. *State* v. *Innis*, *supra*, at 1163.[21] Once having determined that this first admission was obtained illegally, the court then rejected the State's claim of subsequent waiver and excluded all evidence relating to the seizure of the shotgun. The court premised its decision on two analytically distinct nexuses between the prior illegality and the later incrimination: first, a legal nexus founded on future deterrence and the extreme reluctance "to allow the state to benefit from [its] illegal actions . . .", *State* v. *Innis*, *supra*, at 1164; and, second, a factual nexus focusing

---

> cedures that will avoid the future invasion of the citizen's constitutional rights. For that reason, exclusionary rules should embody objective criteria rather than subjective considerations.

Dunaway v. *New York*, ___ U.S. ___, 99 S. Ct. 2248, 2261 (1979) (Stevens, J., concurring).

[21] *See also State* v. *Kachanis*, ___ R.I. ___, 379 A. 2d 915 (1977), where the Supreme Court of Rhode Island relied on a waiver analysis in preference to a *per se* rule to exclude a statement taken after the police had failed to honor a suspect's request for counsel.

on the actual impact of the first admission on the second — "[t]he seizure of the weapon was the product of the improper remarks of Officer Gleckman." *Id.* at 1164.

The former nexus, despite the majority's unnecessary use of "fruit of the poisonous tree" language and its citation to *Wong Sun* v. *United States*, 371 U.S. 471 (1963),[22] entails nothing

---

[22] The petitioner has suggested that the tangible nature of the shotgun takes it out of the ambit of the Fifth Amendment and *Miranda*, except insofar as a fruit of the poisonous tree analysis might be applicable. Although tangible evidence possesses inherent trustworthiness and reliability, this distinction is not central to a Fifth Amendment or *Miranda* argument. The privilege prohibits "the use of 'physical or moral compulsion' exerted on the person asserting the privilege." *Fisher* v. *United States*, 425 U.S. 391, 397 (1976) (citations omitted); *see also In re Gault*, 387 U.S. 1 (1967); *cf.* 8 Wigmore, *Evidence*, § 2266 (McNaughton rev. 1961).

Certain evidence, procured by compulsion, while obviously implicating the Fifth Amendment, has been deemed to fall outside this broad prohibition, by virtue of its "non-testimonial" (i.e., uncommunicative or non-assertive) characteristics. *Schmerber* v. *California*, 384 U.S. 757, 761 (1966); *United States* v. *Wade*, 388 U.S. 218 (1967); *Gilbert* v. *California*, 388 U.S. 263 (1967); *cf.* 8 Wigmore, *Evidence*, § 2263 (McNaughton rev. 1961). This distinction permits compelled production of evidence essentially relating to identification of physical characteristics, and maintains the principles of the Fifth Amendment inviolate.

> The Fifth Amendment privilege against compulsory self-incrimination is an "intimate and personal one," which protects "a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation."

United States v. *Nobles*, 422 U.S. 225, 233 (1975), quoting *Couch* v. *United States*, 409 U.S. 322, 327 (1973).

The petitioner has attempted to excise the shotgun from the attendant circumstances of its recovery. The basis for this excision is unclear. This case involves not a series of loosely related events but one continuous incriminating transaction. While the shotgun itself may not be "testimonial," the attendant circumstances, taken as a whole, comprise a communicative act more graphic than mere words could ever be. *See Schmerber* v. *California*,

more than a routine application of the *Miranda* prophylaxis explicated in *Fare* and *Mosley*. The latter nexus raises the question whether the respondent in fact waived his protections, *given* the prior admission in the police wagon and the circumstances which induced it.

The respondent submits that the record amply supports the decision of the Supreme Court of Rhode Island that at no point during the proceedings did he waive his previously invoked right to counsel. In addition, he contends that the conduct of the Providence police blatantly violated the requirement of *Miranda* that all interrogation cease upon a request for counsel and that the Supreme Court of Rhode Island was correct in concluding that a subsequent renewal of his *Miranda* warnings could not as a matter of law cure the violation which had occurred only minutes earlier.

1. The Police Failed Scrupulously to Honor the Respondent's Invocation of his Right to Counsel.

This Court has recently made very clear that a suspect's request for counsel "is *per se* an invocation of his Fifth Amendment rights, requiring that all interrogation cease." *Fare* v. *Michael C.*, *supra*, at 3187. If the police fail to heed a request

supra, at 761 n.5. The respondent was not only compelled to exhibit his knowledge of the presence of the shotgun, but was further compelled to demonstrate his knowledge of the precise location of the item. His actions were tantamount to a compelled admission of both possession and control of the shotgun, and it is this admission, extracted from the mind, the "private inner sanctum" of the respondent which implicates the Fifth Amendment and *Miranda*. *See State* v. *Dennis*, 16 Wash. App. 417, 558 P. 2d 297 (1976); *State* v. *Moreno*, 21 Wash. App. 430, 585 P. 2d 481 (1978); *State* v. *Mason*, 164 N.J. Super. 1, 395 A. 2d 536 (1979). If the respondent's statements had merely provided a lead to the location of the weapon which the police had later exploited, this would be a fruits case. Where, as here, the police induced Innis to exhibit his knowledge of the shotgun and its location, it is a communications case covered by the Fifth Amendment and *Miranda*.

for counsel and interrogation continues, any ensuing statement must be excluded from the direct evidence against the accused, regardless of its voluntariness under traditional Fifth Amendment analysis. *Id.* at 3187; *Miranda* v. *Arizona*, *supra*, at 479; *see also Michigan* v. *Mosley*, *supra*; *Oregon* v. *Hass*, 420 U.S. 714 (1975). This stringent rule is based on the need to protect the crucial function played by counsel in the adversarial system of criminal justice (*Fare* v. *Michael C.*, *supra*, at 3187) and the presumption that any statement taken after a person invokes his constitutional protections "cannot be other than the product of compulsion, subtle or otherwise." *Miranda* v. *Arizona*, *supra*, at 474.

In *Michigan* v. *Mosley*, *supra*, at 102-103, this Court rejected the contention that *Miranda* created "a *per se* proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent." Mr. Justice Stewart noted, by way of contrast, that *Miranda* may place more stringent limitations on the reopening of questioning once counsel has been requested. *Id.* at 104 n.10.[23] *Innis*, however, does not present the question whether the "scrupulous regard" requirement demands total cessation of all efforts to obtain a waiver until an attorney is present, regardless of the time lapse and the circumstances of the renewed attempt. It presents only the issue whether, without first seeking a clear waiver, the police may seek to elicit incriminating responses from a suspect in custody within minutes of his invocation of the right to counsel.

[23] Lower courts have split on the question whether a request for counsel bars any further interrogation until the suspect has had an opportunity to consult with counsel. *See People* v. *Grant*, 45 N.Y. 2d 366, 375 n.1, 380 N.E. 2d 257, 262 n.1, 408 N.Y.S. 2d 429, 434 n.1 (1978) (collecting cases); *see also*, Note, *Fifth Amendment, Confessions, Self-Incrimination — Does a Request for Counsel Prohibit a Subsequent Waiver of Miranda Prior to the Presence of Counsel?*, 23 Wayne, L. Rev. 1321 (1977).

Thomas Innis requested to see an attorney. He was immediately placed in a police wagon where his attending officers wasted no time in inducing an inculpatory statement. Not only did their comments follow hard on the heels of the respondent's request for counsel, but also they were peculiarly adapted to negate the exercise of the right, as they demanded a response which could not wait on the arrival of counsel.[24] This sequence of events is a paradigm of the conduct which the *Miranda* prophylaxis sought to prevent.

> To permit the continuation of custodial interrogation after a momentary cessation would clearly frustrate the purposes of *Miranda* by allowing repeated rounds of questioning to undermine the will of the person being questioned.

Michigan v. *Mosely*, *supra* at 102; *see also*, *e.g.*, *United States* v. *Charlton*, 565 F. 2d 86 (6th Cir. 1977); *United States* v. *Massey*, 550 F. 2d 300 (5th Cir. 1977); *United States ex rel. Williams* v. *Twomey*, 467 F. 2d 1248 (7th Cir. 1972); *Combs* v. *Wingo*, *supra*; *United States* v. *Miller*, 432 F. Supp. 382 (E.D. N.Y. 1977); *United States* v. *Maddox*, 413 F. Supp. 60 (W.D. Okl. 1976); *compare*, *United States* v. *Pheaster*, 544 F. 2d 353 (9th Cir. 1976).

The petitioner implicitly concedes that, if Officer Gleckman's comments were tantamount to interrogation,[25] the respondent's initial admission in the police wagon was obtained in violation of *Miranda* (Petitioner's Brief at 27). Instead, the petitioner focuses on the events following the respondent's return to the scene of his arrest, arguing that the final set of warnings administered by Captain Leyden and the respondent's agreement to lead the police to the shotgun constituted a waiver of his previously invoked right to counsel (Petitioner's Brief at 27-28). This argument mistakes the nature of the *Miranda* prophylaxis at issue and ignores the existence of the prior violation. At the time the respondent requested the assistance of counsel, Captain Leyden acted as he was required to do under law: he ordered that Innis be transported downtown and that he not be coerced or interrogated (App. 46). In direct contravention of these orders, his subordinates immediately proceeded to pressure their prisoner into an inculpatory agreement to lead them to incriminating evidence.

Captain Leyden's subsequent rendition of the warnings required by *Miranda* could not undo what had already been done. At the point when he requested Innis to reconsider his previously invoked right to counsel, Captain Leyden was the immediate beneficiary of an incriminating admission induced

[24] Oregon has held that the police "may simply inquire if [the suspect] has decided to retract his request for counsel but they may not use subtle, coercive means to achieve a change of mind." *State* v. *Johnson*, *supra*, 586 P. 2d at 814.

[25] While the respondent believes that the comments were interrogation as *Miranda* [illegible]ded that term to be construed, the scrupulous regard requirement does [illegible]t depend on the construction of this term and would appear to encompass any deliberate attempt to elicit incriminating information. Professor Kamisar in discussing *Brewer* v. *Williams*, *supra*, noted that:

> Moreover, and more generally, even if the "Christian burial speech" did not amount to "interrogation" within the meaning of *Miranda*, how can it be said that a detective who "deliberately and designedly set[s] out to elicit information from one who has exercised his *Miranda* rights" is "fully respect[ing]" or "scrupulously honor[ing]" those rights.

Kamisar, *supra*, at 73. As the scrupulous regard requirement focuses solely on the behavior of the police, a suspect who requests counsel would appear to be in much the same position as one whose *Massiah* right to counsel has attached, at least insofar as he will be protected from efforts to gain information not involving overt police pressure. *Id.* at 78 n.461; *see also State* v. *Travis*, *supra*.

by conduct in clear violation of *Miranda*, and his actions only formalized what had already been done informally and illegally.

In suggesting that Innis' subsequent incrimination should be admissible even if his previous one was not, the petitioner is in effect requesting that this Court create a silver platter doctrine operable within the confines of a single police force. *Cf. Elkins* v. *United States*, 364 U.S. 206 (1960). If one policeman may insulate from judicial censure the actions of another, there will be little impetus to obey the mandates of this Court in the first instance, particularly when disobeying them may soften up the suspect or, as in this case, actually result in an agreement to self-incriminate, requiring only a subsequent formal waiver to make fully admissible the substance of the incrimination.[26] Moreover, *Miranda's* prophylactic requirement that interrogation must cease upon a request for counsel is based in part on the need to inform "police and prosecutors with specificity as to what they may do in conducting custodial interrogation . . .." *Fare* v. *Michael C.*, *supra*, at 3187. The information ceases to be specific when a waiver test is substituted as the determinant of admissibility. The available evidence indicates that, despite the obligation of the police to give *Miranda* warnings, most suspects in custody do not invoke their rights and instead execute full waivers. Note, *Interrogations in New Haven: The Impact of Miranda*, 76 Yale L. J. 1519 (1967); Griffiths and Ayres, *A Postscript to the Miranda Project: Interrogation of Draft Protesters*, 77 Yale L. J. 300 (1967); Seeburger and Wettick, *Miranda in Pittsburgh — A Statistical Study*, 29 U. Pitt. L. Rev. 1 (1967); Medalie, Zeitz

[26] The clear implication of the petitioner's position is that the police should be allowed to interrogate without warnings, gain an initial admission, formally recite the suspect's rights, obtain a waiver and proceed to a fully admissible confession, limited only by the requirement that the waiver be voluntary in the totality of the circumstances.

and Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 Mich. L. Rev. 1347 (1968). *Innis* is the relatively rare case where the record contains an unambiguous and undisputed request for counsel. This request must be given credence by the courts if the Fifth Amendment core of *Miranda* is to remain insulated from the evidentiary problems inherent in reconstructing in the courtroom the reality of incommunicado interrogation. Thus, as *Fare* recognized, when the police fail scrupulously to honor a request for counsel, an immediately ensuing incrimination must be suppressed without regard for any argument that the suspect subsequently waived his rights. *Innis* clearly falls within this rule.

2. At No Point did the Respondent Waive his Previously Invoked Right to Counsel and Privilege Against Compelled Self-Incrimination.

Even in situations where a defendant has not requested the presence of counsel, *Miranda* holds that

> [i]f the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.

Miranda v. *Arizona*, *supra*, at 475. The determination whether the respondent in fact waived the rights delineated in *Miranda* demands an inquiry into the totality of the circumstances surrounding the interrogation. *Fare* v. *Michael C.*, *supra*, at 3189.

The Supreme Court of Rhode Island elected to focus on the more flexible issue of waiver in preference to an exclusive reliance on the *per se* rule explicated in *Fare*. After quoting the standard of waiver enunciated in *Miranda*, the court noted the following undisputed facts relevant to the legal question of waiver: (1) the respondent had asked to see an attorney only minutes before his incriminating statement in the police wagon; (2) the incriminating statement followed directly from the remarks to Officer Gleckman; and (3) there was nothing in the record to suggest an affirmative waiver of rights[27] other than the fact that Innis ultimately agreed to assist the police in locating the incriminating evidence. *Id.* at 1163-1164. These few facts were all that could be gleaned from the record in the present case, and *Miranda* makes clear that they are woefully inadequate to establish a voluntary waiver. *Miranda* v. *Arizona*, *supra*, at 475-476. Moreover, the request for counsel, while triggering the *per se* rule, also operates as an evidentiary fact which strongly militates against any conclusion of later waiver.

> [T]he accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism.

[27] The Supreme Court of Rhode Island made clear that the absence of an affirmative waiver was only one factor, albeit an important one, to be considered in deciding whether the State had borne its heavy burden of proving waiver. The majority opinion did not even imply that an explicit waiver was a precondition to the admissibility of a statement taken from a suspect in custody, *cf. North Carolina* v. *Butler*, ___ U.S. ___, 99 S. Ct. 1755 (1979); it merely applied the long-recognized principle that "[c]ourts will entertain every reasonable presumption against the waiver of a fundamental constitutional right . . .." *State* v. *Innis*, *supra*, at 1163; *accord*, *Brewer* v. *Williams*, *supra*, at 404; *Brookhart* v. *Janis*, 384 U.S. 1, 4 (1966).

Michigan v. *Mosely*, *supra*, at 110 n.2 (White, J., concurring); *see also White* v. *Finkbeiner*, 570 F.2d 194, 200 n.3 (7th Cir. 1978); *United States* v. *Clark*, 499 F. 2d 802, 807 (4th Cir. 1974); *United States* v. *Cavallino*, 498 F. 2d 1200, 1202-1203 (5th Cir. 1974); *United States* v. *Lewis*, 425 F. Supp. 1166, 1178 (D. Conn. 1977).

The petitioner does not suggest that Innis' initial incriminating response to Officer Gleckman followed a valid waiver (Petitioner's Brief at 27). Instead, the petitioner argues that a waiver occurred subsequent to the violation, when Mr. Innis was returned to the scene of his arrest, where he was given another set of warnings and he again agreed to locate the weapon (Petitioner's Brief at 27-28). If in fact the respondent had not been induced to incriminate himself immediately prior to his return, this sequence of events would support a conclusion that the respondent validly waived his constitutional protections. As the Supreme Court of Rhode Island recognized, however, the respondent's later incriminating behavior cannot reasonably be separated from the prior illegality which had elicited an admission only minutes before.[28]

[28] The cases discussing the impact of a prior illegally obtained confession on a subsequent confession bear a surface resemblance to the "fruit of the poisonous tree" cases, but they rest on a fundamentally different analytical predicate. The exclusionary rule of the *Wong Sun* line of cases was developed primarily to deter future occurrences of the initial violation and not to exclude statements which otherwise failed to satisfy legal standards of admissibility. (*See* part II, *infra*, discussing the applicability of a fruits analysis to the present case.) The cases referred to in this section of the brief test the admissibility of subsequent confessions according to traditional waiver standards, taking into account the coercive effect of having previously confessed to the crime and the fact that the conditions which rendered the first statement inadmissible may carry over to the second if they are not adequately separated in time and circumstance. Suppression of the subsequent incrimination may be required, not because the suspect's rights were previously violated, but because he did not voluntarily waive the privilege before confessing the second time.

Over thirty years ago in *United States* v. *Bayer*, 331 U.S. 532 (1947), this Court considered a claim that a confession, presumed to have been taken in violation of the prophylactic rule of *McNabb* v. *United States*, 318 U.S. 332 (1943), and *Anderson* v. *United States*, 318 U.S. 350 (1943), rendered inadmissible a later confession. Although rejecting any *per se* rule that the mere existence of one illegal confession "perpetually disables" the confessor from making a subsequent legal confession, Mr. Justice Jackson, writing for a unanimous Court, stressed the psychological impact on the accused of once having given an incriminating statement.

> [A]fter an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good.

Id. at 540. Similarly, Mr. Justice Harlan, concurring and dissenting in a case decided on Fourteenth Amendment voluntariness grounds, noted that the state has

> the burden of proving not only that the later confession was not itself the product of improper threats or promises or coercive conditions, but also that it was not directly produced by the existence of the earlier confession.

Darwin v. *Connecticut*, 391 U.S. 346, 351 (1968) (Harlan, J., concurring and dissenting); *see also Harrison* v. *United States*, 392 U.S. 219 (1968) (holding testimony given at a prior trial

inadmissible at a retrial because it was induced by the erroneous introduction of an illegal confession).[29]

In a parallel line of cases, this Court has held that, where conditions of compulsion or other illegality render an initial confession inadmissible and then carry over to a second confession, if there is "no break in the stream of events," the latter confession must be excluded for the same reasons that tainted the first. *Darwin* v. *Connecticut*, *supra*; *Clewis* v. *Texas*, 386 U.S. 707 (1967); *Leyra* v. *Denno*, 347 U.S. 556 (1954); *Lyons* v. *Oklahoma*, 322 U.S. 596 (1944). This recognition of the continuing effects of earlier compulsion, despite the intervention of a temporal hiatus and the giving of constitutional warnings, was the explicit basis for decision in *Westover* v. *United States*, 384 U.S. 436, 494 (1966). Westover was extensively interrogated without first being informed of his rights. Later he was turned over to the F.B.I., where he was given *Escobedo* warnings, and he confessed. Noting that a different case would have been presented if the second interrogation had been removed in time and space, this Court concluded that

> the FBI interrogation was conducted immediately following the state interrogation in the same police station — in the same compelling surroundings. Thus, in obtaining a confession from Westover the federal authorities

[29] The majority in *Harrison* used "fruit of the poisonous tree" language to reach its conclusion. Mr. Justice White dissented, largely on the ground that the deterrence rationale of the fruits doctrine was not appropriate in the *Harrison* setting. To the degree, however, that *Harrison* rests on a conclusion that "the petitioner's trial testimony was *in fact* impelled by the prosecution's wrongful use of his illegally obtained confessions" (*id.* at 224 (emphasis supplied)), *Harrison* supports the argument made here that the fact of Innis' initial admission, as well as his continuing custody, provide an ample factual basis for the conclusion that his later incriminating conduct was the direct product of the prior illegality.

were the beneficiaries of the pressure applied by the local in-custody interrogation. *Id.* at 496-497.

The lower federal courts have consistently applied the *Bayer* cat-out-of-the-bag theory and have realistically appraised the continuing effect of prior illegal police behavior to exclude on a case-by-case basis subsequent confessions given after adequate warnings, where the two confessions were closely related in time and circumstances, and the police in effect "entered the fray armed with defendant's earlier admissions." *United States* v. *Pierce*, 397 F. 2d 128, 131 (4th Cir. 1968); *see also, e.g., United States* v. *Nash*, 563 F. 2d 1166 (5th Cir. 1977), *rev'd en banc* on other grounds, *Nash* v. *Estelle*, No. 75-3773, June 21, 1979 (one confession the product of the other where defendant without warnings admits crime, is given warnings, signs waiver and readmits crime); *Randall* v. *Estelle*, 492 F. 2d 118 (5th Cir. 1974) (written confession after warnings and "waiver" not the product of "free and unfettered" choice where defendant four days earlier had confessed after inadequate warnings); *United States* v. *Robinson*, 439 F. 2d 553 (D.C. Cir. 1970) (confession after warnings simply the culmination of prior confessions given without warnings several hours earlier); *Evans* v. *United States*, 375 F. 2d 355 (8th Cir. 1967) (two-day time lapse would not vitiate effect of first confession where same officer present). Where, however, there was a real break in the stream of events and where the mind of the accused was no longer dominated by the prior incrimination, the later confession has been deemed admissible. *See, e.g., Jennings* v. *Casscles*, 568 F. 2d 229 (2d Cir. 1977); *United States* v. *Gorman*, 355 F. 2d 151 (2d Cir. 1965), *cert. den.* 384 U.S. 1024 (1966). The question whether the existence of a prior illegal confession and the circumstances surrounding its taking may render a subsequent confession inadmissible requires the drawing of inferences from the facts as found, and, thus, is primarily an issue for the trier of fact. *Lyons* v. *Oklahoma, supra*, 603. In the present case, the trial justice made no findings of fact on this crucial question (App. 62-63), and the Supreme Court of Rhode Island, in the exercise of its own independent judgment, determined that Innis' later incriminating actions were "the product of the improper remarks of Officer Gleckman." *State* v. *Innis, supra*, at 1164.[30] The record amply supports this conclusion.

Mr. Innis had asked to see an attorney and, instead, while in "an inherently coercive setting" (*Brewer* v. *Williams, supra*, at 413 n.2 (Powell, J., concurring)), he had been made privy to highly emotive statements, amounting to "subtle compulsion" in view of the Supreme Court of Rhode Island. In response to these statements, he made an incriminating agreement to lead the officers to a shotgun. The officers immediately radioed this development to Captain Leyden back at the scene of the arrest (App. 44), and the respondent could hear this radio call (App. 46). Within minutes, he was confronted by Captain Leyden, who was already "armed with defendant's earlier admission." The officers in the wagon repeated that Innis would show them where the shotgun was located (App. 22). One officer originally testified that the first words out of Captain Leyden's mouth were, "You want to show us where it was [*sic*]," and that Innis said yes (App. 24).[31] Others testified that he was immediately rewarned of his rights and that he agreed to lead them to the shotgun because of the children in the area (App. 39).

[30] The Rhode Island court's ordinarily broad scope of review over the voluntariness of confessions is augmented where the trial court fails to exercise its independent judgment on the factual predicate to the legal issues presented by the case. *Cf. State* v. *Card*, 105 R.I. 753, 255 A. 2d 727 (1969); *State* v. *Frageorgia*, 84 R.I. 30, 121 A. 2d 321 (1956).

[31] Immediately subsequent to this answer the officer testified that he did not actually hear the comment (A. 24-25).

At the time of his alleged waiver, Mr. Innis' circumstances had not materially changed: he was back at the scene of his gunpoint arrest, still handcuffed and still surrounded by police officers, including those whom he had already promised he would do what they clearly wished him to do (App. 39). By his prior admission, he was totally committed to an incriminating course of action. Not only was the cat out of the bag, but he had promised to keep it there. There was no "break in the stream of events": one admission led immediately to the next while he remained in the custody of the same police officers (App. 39). Innis' express reason for leading the police to the shotgun, the risk to little children, indicates the continuing impact of the morality play staged in the police wagon. The only intervening event, the *pro forma* administration of a fresh set of warnings, could not cure the previous illegality. Mr. Innis' problem was not lack of information regarding his rights; he had already received three sets of warnings. Rather, it was his clearly expressed inability to deal with the police without legal advice. *Michigan* v. *Mosley*, *supra*, at 110 n.2 (White, J., concurring). New warnings in the same custodial setting could not bestow competence where none existed before. In short, at the time the respondent "voluntarily" waived his previously invoked protections, the available evidence indicates that he could not have reasonably refused to do otherwise.

Given the nature of the prior illegality, the existence of an admission committing the respondent to incriminate himself, and the close factual nexus between events in the wagon and those following the return to the scene of the arrest, the State could not and did not carry its heavy burden of demonstrating a truly voluntary waiver of the respondent's constitutional protections. As in *Brewer* v. *Williams*, *supra*, at 404, the facts of this case demonstrate "comprehension" but not "relinquishment." In these circumstances, the Supreme Court of Rhode

Island was fully justified in concluding that all of the evidence relating to the seizure of the shotgun, regardless of the applicability of any *per se* rule of exclusion, was obtained in violation of *Miranda*.

II. The Supreme Court of Rhode Island was Correct in Concluding that the Shotgun Itself Should have been Suppressed from Evidence.

Miranda v. *Arizona*, 384 U.S. 436, 479 (1966), mandates that "unless and until . . . warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against [the defendant]." *See also Fare* v. *Michael C.*, ____ U.S. ____, 25 Cr. L. 3184, 3187 (1979). The respondent has contended in part I of this brief that the events leading to and including the seizure of the shotgun were all part of a single incriminating transaction undertaken after the invocation of the right to counsel and in the absence of a voluntary waiver; the decision of the Supreme Court of Rhode Island should therefore be affirmed as an application of settled principles to a difficult and somewhat obscure record which, under state law, the court had an obligation to evaluate independently. Rejecting the state court's finding of "subtle compulsion" and minimizing the factual nexus between the initial illegality and the immediately ensuing incrimination, the petitioner characterizes this case as involving a purely technical violation of *Miranda* and a *per se* exclusion of peculiarly reliable derivative evidence. On this basis, it argues in part III of its brief that under *Michigan* v. *Tucker*, 417 U.S. 433 (1974), the state court should have applied a flexible exclusionary remedy to the suppression of the

shotgun itself and that on the facts of this case exclusion of the shotgun was erroneous as a matter of federal law.[32] Even assuming that the finding of the shotgun may be disconnected from the incriminating acts and admissions which linked it to the respondent (*see supra* at p. 35 n.22), the respondent suggests that the petitioner has underestimated the nature and extent of the initial illegality, and consequently, through an undifferentiated application of *Michigan* v. *Tucker*, *supra*, has constructed an argument for flexible exclusion inappropriate to the present case.

A. *The Police's Use of Psychological Pressure to Induce Self-Incrimination in an Already Coercive Setting, After a Request for Counsel, Violated the Respondent's Privilege Against Compelled Self-Incrimination.*

The constitutional problem in the present case is not just that the Providence police applied psychological pressure on the respondent to incriminate himself in an already coercive

[32] This Court need not, however, reach this issue. The shotgun by itself was not particularly probative. The crucial evidence was Mr. Innis' admissions and conduct which established his knowledge and previous control of the weapon. If these acts and admissions should have been excluded at trial, the question of the admissibility of the shotgun becomes *de minimis*. As the petitioner has not claimed that the introduction of the police testimony regarding the respondent's incriminating course of conduct was harmless in light of the other evidence against him (*see* Petitioner's Brief at 43), error in admitting this evidence will necessitate a new trial regardless of this Court's disposition of the fruits argument. If these admissions and conduct were properly admitted, the introduction of the shotgun would be harmless error (*see* part III, *infra*). This case is simply not one where the tangible evidence, divorced from the context of its findings, was crucial to either side. *Compare Killough* v. *United States*, 336 F. 2d 929 (D.C. Cir. 1964); *cf. Brewer* v. *Williams*, 430 U.S. 387, 416 n.1 (1977) (Burger, C.J., dissenting); *Keister* v. *Cox*, 307 F. Supp. 1173 (W.D. Va. 1969).

setting; nor is it simply that they did so by means of a ploy which virtually precluded the possibility of a valid waiver. What distinguishes this case from the ordinary *Miranda* case is the undisputed fact that the pressure was exerted immediately after the respondent had requested the assistance of counsel.

The foundation of the *Miranda* decision is the explicit extension of the privilege against compelled self-incrimination to custodial interrogations occurring prior to the beginning of formal judicial proceedings.[33] The majority was fully aware that it was setting a stricter constitutional standard for the admissibility of confessions than had been required by the Fourteenth Amendment; indeed, in reference to the four cases before the court, Mr. Chief Justice Warren admitted that "we might not find the defendants' statements to have been involuntary in traditional terms." *Miranda* v. *Arizona*, *supra*, at 457; *see also Michigan* v. *Tucker*, *supra*, at 443. In order to fulfill the policies of the privilege, the accused must be guaranteed "the right . . . to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Id.* at 460, quoting *Malloy* v. *Hogan*, 378 U.S. 1, 8 (1964). Any incrimination must be "the product of his free and rational choice." *Greenwald* v. *Wisconsin*, 390 U.S. 519, 521 (1968). It may not be obtained "by the exertion of any improper influence." *Malloy*

[33] At the time of its adoption, the privilege was apparently intended to proscribe judicial interrogation of the accused at trial and more particularly during preliminary examination. Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 Mich. L. Rev. 59, 73 (1966). During the eighteenth century, magistrates exercised the investigative function now given over to the police; professional detectives were unknown and the "primitive constabulary . . . attempted little in the way of interrogation of the persons they apprehended." *Id.* at 66, quoting Mayers, *Shall We Amend the Fifth Amendment?* 86 (1959). Once investigations were transferred from the courthouse to the stationhouse, an extension of the Fifth Amendment was necessary if it was to continue to be "as broad as the mischief against which it seeks to guard." *Counselman* v. *Hitchcock*, 142 U.S. 547, 562 (1892).

v. *Hogan*, *supra*, at 7, quoting *Bram* v. *United States*, 168 U.S. 532, 542-543 (1897).

To insure this full freedom of choice in the exercise of the privilege, *Miranda* mandated a system of procedural safeguards deemed to be "fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation." *Miranda* v. *Arizona*, *supra*, at 476. Where these requirements are not followed and the states fail to adopt "other fully effective means . . . to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored . . . no evidence obtained as a result of interrogation can be used against him." *Id.* at 479. In *Michigan* v. *Tucker*, *supra*, however, this Court concluded that an inadvertent omission of one of the warnings required by *Miranda* did not, on the facts of that case, deprive the respondent of his privilege against compulsory self-incrimination. Mr. Justice Rehnquist emphasized that the accused had been substantially apprised of his rights, including his right to remain silent and his right to counsel, and that he had explicitly waived his right to consult an attorney. *Id.* at 445-446. Moreover, this Court found "significant to [its] decision" the fact that this interrogation preceded the holding in *Miranda* and complied fully with the requirements implicit in *Escobedo* v. *Illinois*, 378 U.S. 478 (1964). *Id.* at 447. Only by transmuting the factual predicate of the decision in *Innis* can the petitioner argue that the *Tucker* analysis should control its result.

The Supreme Court of Rhode Island concluded that comments of Officer Gleckman amounted to "subtle compulsion," *State* v. *Innis*, *supra*, at 1162, and that "[t]his is not a case where a defendant voluntarily confesses to a crime or admits to incriminating evidence on his own." *Id.* at 1163. The court based this conclusion not merely on the coercive impact of Officer Gleckman's remarks taken by themselves, but on the

temporal relationship of these remarks to the respondent's previously invoked right to counsel.

> The defendant's statement to the police admittedly occurred only after his being subjected to Officer Gleckman's remarks, remarks which were highly improper in light of the fact that defendant had not been given an opportunity to consult with his attorney. *Id.* at 1163.

While it is clear that certain deceptive police practices may render a confession involuntary, *see*, *e.g.*, *Spano* v. *New York*, 360 U.S. 315 (1959); *Leyra* v. *Denno*, 347 U.S. 556 (1954), this Court has never had occasion to define in comprehensive fashion the limits placed on techniques of psychological interrogation by the federal constitution. *Miranda* notes that "any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege," and the decision implies that "patent psychological ploys" constitute compulsion within the meaning of the Fifth Amendment. *Id.* at 476, 457. The petitioner contends that, at the very least, where psychological pressure has the effect of negating or undermining a suspect's exercise of his right to remain silent or his right to counsel, any subsequent self-incrimination was compelled within the meaning of the privilege.[34] *See* White, *Police Trickery in Inducing Confessions*, 127 U. Pa. L. Rev. 58 (1979), for a full explication of this analytical approach.

In *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 240 (1973), this Court noted that the basis of the *Miranda* decision was the

[34] *Oregon* v. *Hass*, 420 U.S. 714 (1975), is not to the contrary. This Court emphasized that there was "no evidence or suggestion that Hass' statements . . . were involuntary or coerced." *Id.* at 722.

need to protect the integrity of the trial itself, quoting the following language from the opinion:

> Without the protections flowing from adequate warnings and the rights of counsel, "all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police."

Miranda v. *Arizona*, *supra*, at 466, quoting from *Mapp* v. *Ohio*, 367 U.S. 643, 685 (1961) (Harlan, J., dissenting). In this regard, *Miranda* built on the recognition in *Escobedo* v. *Illinois*, *supra*, at 487 that a refusal to permit a suspect in custody to consult with counsel could "make the trial no more than an appeal from the interrogation."[35] Unless an arrested person has the right to command the presence of counsel,

> [t]he circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators.
>
> . . . . . .
>
> The presence of counsel at the interrogation may serve several significant subsidiary functions as well. If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness.

[35] This Court has since noted that the "'prime purpose' of *Escobedo* was not to vindicate the constitutional right to counsel as such, but, like *Miranda*, 'to guarantee full effectuation of the privilege against self-incrimination . . ..'" *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972), quoting from *Johnson* v. *New Jersey*, 384 U.S. 719, 729 (1966).

> With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial.

Miranda v. *Arizona*, *supra*, at 469-470; *accord*, *Fare* v. *Michael C.*, *supra*, at 3187. Thus, the Court concluded that "the right to have counsel present at the interrogation is *indispensable* to the protection of the Fifth Amendment privilege . . .." *Miranda* v. *Arizona*, *supra*, at 469 (emphasis supplied).[36]

In *Michigan* v. *Mosley*, *supra*, Mr. Justice White recognized that a request for counsel by a suspect in custody differed significantly from an invocation of his right to silence. A person who simply states that he does not wish to talk has made his own decision regarding his interaction with the police. *Id.* at 109 n.1. An attempt to induce him to reconsider his position may violate the *per se* rule of *Miranda*, but it may not necessarily be a violation of the privilege unless under all the circumstances the attempt amounts to compulsion. Where, however, the suspect requests the assistance of counsel, he is in effect saying that he is not competent to fend for himself, that he cannot exercise "free and rational choice" in responding to

[36] This recognition of the unique protections afforded by counsel led the Court to establish a *per se* rule of exclusion where the police fail to honor scrupulously a suspect's request to see an attorney. *Fare* v. *Michael C.*, *supra*, at 3187. It also led the Court to demand that the prosecution satisfy the standard of *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), before a waiver of counsel would be countenanced, even where no previous invocation of the right had occurred. *Schneckloth* v. *Bustamonte*, *supra*, at 240; *see also North Carolina* v. *Butler*, ___ U.S. ___, 99 S. Ct. 1755 (1979).

the authorities' attempt to gain a waiver of his Fifth Amendment privilege. *Id.* at 110 n.2.[37]

The Fifth Amendment privilege "stands as a protection of . . . values reflecting the concern of our society for the right of each individual to be let alone." *Tehan* v. *United States ex rel. Shott*, 382 U.S. 406, 416 (1966). It guarantees a "right to a private enclave where [every person] may lead a private life." *Miranda* v. *Arizona*, *supra*, at 460, quoting *United States* v. *Grunewald*, 233 F. 2d 556, 581-582 (2d Cir. 1956) (Frank, J., dissenting), *rev'd*, 353 U.S. 391 (1957). *Miranda* extended this "right to a private enclave" even to the criminal suspect in custody. When such a person requests the assistance of counsel, he is asking for help in maintaining the integrity of this enclave because he alone cannot withstand the pressures of his situation. He is wrapping his privilege in the protections afforded by counsel, and where the police ignore this attempt to avoid self-incrimination by immediately proceeding to elicit through psychological pressure a relinquishment of the previously claimed right, no waiver is possible. Any ensuing incrimination "cannot be other than the product of compulsion, subtle or otherwise." *Miranda* v. *Arizona*, *supra*, at 474.

In the present case, the respondent requested counsel, and within minutes he was induced to forgo the protections he had just invoked. The nature of the inducement was a morality play which requested a response simultaneously humanitarian and incriminatory. Innis was placed in a false dilemma: either

[37] "It is sufficient to note that the reasons to keep the lines of communication between the authorities and the accused open when the accused has chosen to make his own decisions are not present when he indicates instead that he wishes legal advice with respect thereto. The authorities may then communicate with him through an attorney. More to the point, the accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism." *Michigan* v. *Mosley*, *supra*, at 110 n.2 (White, J., concurring).

he divulged the location of the shotgun or someone, probably a little girl, might die, and he alone must decide. The ploy not only demanded a decision prior to consulting with counsel, but also tended to disguise the real issue, whether he would incriminate himself, by seeking on its face not an admission of a crime but assistance in saving a life.

The utility of counsel in these circumstances is clear. An attorney would recognized the incriminating nature of the desired response, and if Innis nevertheless wished to remove the threat of an unattended shotgun, the attorney could have transmitted the information as to its location, under the cloak of the attorney-client privilege. *Brewer* v. *Williams*, *supra*, at 408 (Marshall, J., concurring). Innis, however, almost certainly unaware of this third option, proceeded to incriminate himself.

The remarks of Officer Gleckman were not only subtly compelling, as the Supreme Court of Rhode Island found; they also served to frustrate the exercise of a right "indispensable to the protections of the Fifth Amendment privilege . . .." *Miranda* v. *Arizona*, *supra*, at 469. Such conduct by the police is not a mere technical violation of prophylactic rules, *compare Michigan* v. *Tucker*, *supra*, but a negation of the purpose and policies of the privilege itself.

B. *The Tangible Fruits of a Violation of the Privilege Against Compelled Self-Incrimination Were Properly Suppressed.*

In concluding that the shotgun should have been suppressed from evidence, as well as the respondent's admissions, the Supreme Court of Rhode Island termed the weapon a "fruit of the poisonous tree" and cited *Wong Sun* v. *United States*, 371 U.S. 471 (1963). Based on the exclusionary principles devel-

oped in the cases of *Weeks* v. *United States*, 232 U.S. 383 (1914) and *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920),[38] this Court concluded in *Wong Sun* v. *United States*, *supra*, that the policies underlying the exclusionary rule did not invite any logical distinction between physical and verbal evidence seized as a result of an illegal arrest. *Id.* at 486. As certain evidence, both physical and verbal, had "been come at by exploitation of that illegality" and not "by means sufficiently distinguishable to be purged of the primary taint," the Court held that it must be suppressed from evidence.

Later cases from this Court have emphasized that "[t]he exclusionary rule . . . was applied in *Wong Sun primarily* to protect Fourth Amendment rights". *Brown* v. *Illinois*, 422 U.S. 590, 599 (1975) (emphasis original); *accord*, *Dunaway* v. *New York*, ___ U.S. ___, 99 S. Ct. 2248, 2258 (1979). Because the purpose of the rule "is to deter — to compel respect for the [Fourth Amendment] guaranty . . ." (*Brown* v. *Illinois*, *supra*, at 599-600, quoting *Elkins* v. *United States*, 364 U.S. 206, 217 (1960)), even a statement meeting the Fifth Amendment standard of voluntariness may not be "sufficiently an act of free will to purge the primary taint". *Id.* at 602, quoting *Wong Sun* v. *United States*, *supra*, at 486. Unlike the line of cases analyzing the actual impact of an illegally obtained confession upon a subsequent confession (see part I(B)(2), *supra*), the issue whether a fruit was secured by the exploitation of the primary illegality "cannot be decided on the basis of causation in the logical sense alone . . .." *United States* v. *Ceccolini*, ___ U.S. ___, 98 S. Ct. 1054, 1059 (1978). It is fundamentally a legal question, drawing its direction from the deterrent purposes of the exclusionary rule and requiring an examination of a number of factors including "[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, . . . and, particularly, the purpose and flagrancy of the official misconduct . . .." *Brown* v. *Illinois*, *supra*, at 603-604 (citations omitted).

[38] In reversing the defendant's contempt citation, the *Silverthorne* Court declared that the essence of the prohibition against illegal search and seizure is "not merely [that the] evidence so acquired shall not be used before the Court but that it shall not be used at all." *Id.* at 392.

While, historically, coerced confessions were suppressed because of their possible unreliability (*see Brown* v. *Mississippi*, 297 U.S. 278 (1936)), an evidentiary problem not usually shared by their fruits, this justification has long since given way to a focus on the threat to the judicial system posed by inquisitorial methods. *See, e.g.*, *Rogers* v. *Richmond*, 365 U.S. 534 (1961); *Spano* v. *New York*, *supra*. The extension of the privilege against compelled self-incrimination to the states and later to the stationhouse was premised solidly on the need to preserve the integrity of the accusatorial process. *Miranda* v. *Arizona*, *supra*, at 460; *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 55 (1964); *Malloy* v. *Hogan*, *supra*, at 8 (1964).

Overt application of the *Wong Sun* — *Brown* exclusionary rule to the Fifth Amendment would merely serve to delineate through existing case law the parameters of the privilege already sketched out by this Court's decisions in the immunity area. As long ago as 1892, this Court concluded that a statute could not replace the privilege where it

> could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted.

Counselman v. *Hitchcock*, *supra* at 564. *Murphy* v. *Waterfront Comm'n*, *supra*, held that the Federal Government could

make no use of the compelled testimony *and its fruits* where a witness had testified under a grant of state immunity. *Id.* at 79. Similarly, in *Kastigar* v. *United States*, 406 U.S. 441 (1972), this Court decided that use and derivative use immunity, being co-extensive with the privilege, provided a constitutionally adequate protection for a witness compelled to give self-incriminating testimony.

> Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness. *Id.* at 453 (emphasis original).

These cases suggest that "a branch [of the fruits doctrine] was always present as an essential element of the Fifth Amendment guarantee." *People* v. *Robinson*, 48 Mich. App. 253, 259-260, 210 N.W. 2d 372, 376 (1973) (notes omitted); *see generally* Note, *Scope of Taint Under the Exclusionary Rule of the Fifth Amendment Privilege Against Self-Incrimination*, 114 U. Pa. L. Rev. 570 (1966).

Already in *Harrison* v. *United States*, 392 U.S. 219 (1968), this Court has invoked the metaphor of the fruit of the poisonous tree to exclude from evidence testimony given at a prior trial to counter the effect of illegally introduced confessions. The rationale for the decision was the imperative of judicial integrity. *Id.* at 224 n.10. More recently, in *Michigan* v. *Tucker*, *supra*, this Court has noted that the deterrance rationale of the Fourth Amendment fruits cases "would seem applicable to the Fifth Amendment context as well." *Id.* at 447. Since *Tucker*, a number of state and lower federal courts have

utilized the fruit of the poisonous tree doctrine to exclude derivative evidence resulting from violations of the privilege. *See, e.g., United States ex rel. Hudson* v. *Cannon*, 529 F. 2d 890 (7th Cir. 1976); *United States* v. *Massey*, 437 F. Supp. 843 (M.D. Fla. 1977); *United States ex rel. Lewis* v. *Henderson*, 421 F. Supp. 674 (S.D. N.Y. 1976); *In re Appeal No. 245*, 29 Md. App. 131, 349 A. 2d 434 (1975). These cases, incorporating both a deterrence rationale and the pure Fifth Amendment exclusionary principles of immunity law, recognize the need to exclude the fruits of a violation of the privilege if the integrity of the guaranty is to be preserved.

Applying a fruits analysis to the present case, it is obvious that the seizure of the shotgun was in very close temporal proximity to the previously compelled admissions. Moreover, the shotgun was the focus of the police pressure from the very beginning. No intervening event, other than a rendition of the *Miranda* warnings, occurred to purge the primary taint, and the initial violation was at worst a flagrant and at best a negligent disregard of the respondent's attempt to exercise his constitutional protections. *Cf. Brown* v. *Illinois*, *supra*, at 603-604. In these circumstances, the shotgun was obtained by the exploitation of a constitutional violation and must be suppressed.

C. *Even If it is Concluded that the Respondent's Privilege Against Self-Incrimination was Not Violated, the Fruits of the Miranda Violation which Occurred in the Present Case Should be Excluded from Evidence.*

Michigan v. *Tucker*, *supra*, expressly refused to decide "the broad question of whether evidence derived from statements taken in violation of the *Miranda* rules must be excluded regardless of when the interrogation took place . . .." *Id.* at 447. Instead, this Court based its holding on a far narrower ground: neither *Miranda* nor judicial policy required the ex-

clusion of third party testimonial evidence resulting from a statement given prior to the date of the *Miranda* decision in the absence of one of the required warnings, at least where there was no hint of coercion in the record, where the police had acted in complete good faith, and where the accused had been informed of his right to remain silent and his right to counsel.

Nor does the present case require resolution of the broad question reserved in *Tucker*. The respondent asserts only that where the police deliberately or at least negligently frustrated his explicit exercise of the right to counsel with the specific objective of locating a piece of tangible evidence, this fruit of the violation of his "second-stage" *Miranda* protections should be excluded from evidence. Initially, it should be noted that, while tangible evidence tends to be inherently trustworthy, the exclusionary rules of *Miranda* and of the Fifth Amendment, even as applied to the statements of the accused, are not primarily directed toward the exclusion of unreliable evidence. *Miranda* v. *Arizona*, *supra*, at 480-481; *Murphy* v. *Waterfront Comm'n*, *supra*, at 55; *Tehan* v. *United States ex rel. Shott*, *supra*, at 415-416. Moreover, to the degree that the Fifth Amendment does serve this purpose, *Miranda* "provided new safeguards against the possible use at trial of unreliable statements of the accused . . .." *Michigan* v. *Tucker*, *supra*, at 455. (Brennan, J., concurring.) This function is particularly true of the "second-stage" protections of *Miranda* designed to insure the suspect's ability to cut off *ex parte* interrogation before the custodial pressures had built to such a degree as to make a false confession a real possibility. Thus, to the degree that this Court validates an infringement of these rules, it will be opening the door to precisely the pressures most likely to result in unreliable self-incrimination.[39]

[39] Once the police are told they may disregard a request for counsel in search of tangible fruits, they will do so. *See Brinegar* v. *United States*, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting). Where no adequately incriminating fruits result from their continued interrogation of the suspect but a statement is obtained, the temptation will be present to modify suppression hearing testimony to get the statement into evidence.

The Fourth Amendment fruits doctrine has recently been placed squarely on a deterrence rationale which incorporates earlier notions of judicial integrity. *Brown* v. *Illinois*, *supra*, at 599. Regardless of whether this rationale should be applicable to all *Miranda* violations occurring after the date of the *Miranda* decision (*see generally* Note, *Miranda Without Warning: Derivative Evidence as Forbidden Fruit*, 41 Brooklyn L. Rev. 325 (1974)), it is peculiarly appropriate here. *Innis* is not a case where the police acted in "complete good faith." *Compare Michigan* v. *Tucker*, *supra*, at 447. Officer Gleckman not only disregarded the respondent's invocation of his right to counsel, but he disobeyed the orders of his superior officer, who did follow the *Miranda* mandate. The shotgun was not an unanticipated but legally tainted fruit of a general admission, but rather it was the precise objective of an interrogation undertaken in violation of *Miranda*. Unlike a witness whose identity was discovered by illegal means, the shotgun could not have come forward by itself. *Cf. United States* v. *Ceccolini*, *supra*; *Smith* v. *United States*, 324 F. 2d 879 (D.C. Cir. 1963) (Burger, J., dissenting). Innis had to bring it forward and in the process incriminate himself.

If the police are permitted to ignore a request for counsel whenever they are seeking tangible as opposed to verbal evidence, the deterrent effect of the *Miranda* prophylaxis will disappear. In those relatively few cases where a suspect unambiguously invokes his constitutional protections, the police will have nothing to lose from continued interrogation. Presumably, the suspect will not later confess if they do scrupulously regard his request for counsel, so the police will have a strong incentive to forgo the remote possibility of an admissible oral

statement to seek tangible evidence which will be admitted at trial regardless of their overbearing conduct.

Since *Tucker*, courts have split over the applicability of the fruits doctrine to violations of *Miranda*. *Compare Government of the Virgin Islands* v. *Gereau*, 502 F. 2d 914, 927 (3d Cir. 1974), *cert. den.* 420 U.S. 909 (1975); *Commonwealth* v. *White*, ___ Mass. ___, 371 N.E. 2d 777 (1977), *aff'd* by a divided Court, 99 S. Ct. 712 (1978); *State* v. *Wheeler*, 92 N.M. 116, 583 P. 2d 480 (1978); *Commonwealth* v. *Wideman*, 479 Pa. 102, 385 A. 2d 1334 (1978); *with Simmons* v. *Clemente*, 552 F. 2d 65 (2d Cir. 1977); *United States ex rel. Hudson*, *supra*; *United States* v. *Massey*, *supra*. None of these cases, however, has involved a fact pattern approximating the one presented here.

If law enforcement authorities are to be required scrupulously to honor a suspect's exercise of his rights, the courts must remove the incentive to disregard a request for counsel. *See Michigan* v. *Tucker*, *supra*, at 446. Admissible tangible evidence is an incentive no less strong than an oral statement where from the first it was the objective of the illegal interrogation. The Supreme Court of Rhode Island was correct in excluding the shotgun from evidence as a direct fruit of an interrogation proscribed by *Miranda*.

III. Even If the Supreme Court of Rhode Island Erred in Concluding that the Shotgun Itself Should have been Suppressed, Admission of the Shotgun Alone Would Not Render Harmless the Admission of Police Testimony Regarding the Respondent's Incriminating Statements and Conduct.

In part III of its brief, the petitioner raises the issue of harmless error (Petitioner's Brief at 43-44). The petitioner

does not argue that the introduction of testimony regarding the respondent's incriminating agreements and conduct in leading police to the shotgun should be deemed harmless in light of other evidence presented by the state. Instead, petitioner argues that if the second admission and the shotgun, or alternatively only the shotgun, were properly admitted, then the introduction of any other testimony regarding the incriminating agreements and subsequent conduct was harmless beyond a reasonable doubt. This argument was not made by the petitioner before the Supreme Court of Rhode Island,[40] and this Court should "decline to reach [it] as an initial matter." *Sandstrom* v. *Montana*, ___ U.S. ___, 25 Cr. L. 3159, 3164 (1979). Moreover, no harmless error argument was raised in the petition for writ of certiorari. Supreme Court Rule 23(1)(c) states that "[o]nly the questions set forth in the petition or fairly comprised therein will be considered by the court." This rule has been carefully applied to prevent "the practice of smuggling additional questions into a case after [the court] grant[s] certiorari." *Irvine* v. *California*, 347 U.S. 128, 129 (1954); *see also F.D. Rich Co., Inc.* v. *United States ex rel. Industrial Lumber Co., Inc.*, 417 U.S. 116 (1974); *Strunk* v. *United States*, 412 U.S. 434 (1973).

The crucial evidence against the respondent was not the shotgun itself, removed from the incriminating circumstances of its recovery; it was the testimony relating to the respondent's several agreements to lead the police to the weapon and his conduct in actually locating the item (A. 70, 71-73). If this Court rules that the evidence of the respondent's second admission and of his subsequent conduct was properly admitted

[40] The Supreme Court of Rhode Island did conclude, *sua sponte*, that the total evidence relating to the finding of the shotgun was not harmless beyond a reasonable doubt. *State* v. *Innis*, *supra*, at 1164. Subsequently, the State, on petition for reargument out of time, raised for the first time the narrower harmless error argument made here. The Supreme Court of Rhode Island denied the petition for reargument out of time on procedural grounds and thus never reached the issue on its merits.

by the trial court, then any error in admitting the initial admission or the shotgun would be harmless. If, however, evidence was improperly admitted but the shotgun, divorced from its incriminating background, could nevertheless come in, the error in admitting the police testimony could not possibly be harmless. As the shotgun, by itself, was relatively non-probative,[41] the respondent's conviction would still have to be reversed.

This case is not one in which tangible evidence, if abstracted from the circumstances of its seizure, was of particular importance to either side. In the absence of any claim that the introduction of the entire incriminating transaction was harmless error, the petitioner's attempt to divide this course of conduct into independently viable parts should be rejected.

Conclusion.

At its core, this case presents the issue whether, at the moment a suspect in custody requests legal counsel, that request shields his privilege against self-incrimination or merely acts as a signal to the police to forgo direct confrontation and embark on a stealthy encroachment on the Fifth Amendment guaranty.

The respondent asks this Court not to reduce the request for counsel, usually uttered as a last hope under hostile circumstances, to futile words by approving any attempt of the police to extract incriminating information just so long as they avoid the use of the direct question. Both the prosecution and the

[41] In the case at bar, the tangible evidence, the shotgun, is alleged to be the instrumentality of the crime. Its significance therefore is by virtue of the testimony connecting it with the respondent. This case differs from those cases in which tangible evidence, divorced from the incriminating circumstances of its seizure, has independent probative significance. *Cf. Brewer* v. *Williams*, 430 U.S. 387, 416 n.1 (1977) (Burger, C.J., dissenting); *Killough* v. *United States*, 336 F. 2d 929 (D.C. Cir. 1964).

courts require a clear statement from this Court as to what the police may and may not do when a suspect requests counsel. This Court should hold that, once the request is made, the police may not, in the presence of the accused, engage in conversation likely to induce an incriminatory response.

If Thomas Innis had been in the more fortuitous situation of Williams, who had already spoken with counsel and received the support which the respondent sought at the time of his arrest, the police actions here would be found illegal. To reach a contrary result in this case would ignore the reverberations of the "equal protection argument, a ground bass that resounds throughout the *Miranda* opinion."[42]

For the reasons stated above, the respondent respectfully requests that the judgment of the Supreme Court of Rhode Island be affirmed.

Respectfully submitted,

WILLIAM F. REILLY,
Public Defender,
JOHN A. MacFADYEN, III,
Assistant Public Defender,
Appellate Division,
Office of the Public Defender,
250 Benefit Street,
Providence, Rhode Island 02903.

[42] Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. Cinn. L. Rev. 671, 711 (1968).

FOR ARGUMENT.

In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-1076.

STATE OF RHODE ISLAND,
PETITIONER,

v.

THOMAS J. INNIS,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND.

Reply Brief for the Petitioner.

DENNIS J. ROBERTS II,
Attorney General,
STEPHEN LICHATIN III,
Special Assistant Attorney General,
Chief, Appellate Division,
Providence County Courthouse,
Providence, Rhode Island 02903.

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

Table of Contents.

Table of Authorities Cited.

Cases.

Constitutional Provisions.

MISCELLANEOUS.

In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-1076.

STATE OF RHODE ISLAND,
PETITIONER,

v.

THOMAS J. INNIS,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND.

Reply Brief for the Petitioner.

Argument.

I. RATIONALES UNDERLYING MIRANDA V. ARIZONA.

The Court in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), built its opinion on the foundation of the Fifth Amendment's interdiction of compulsory self-incrimination. However, the Court tendered two rationales:

> The first, by far the stronger in terms of providing constitutional legitimacy, premised the holding upon the conclusion that custodial interrogation is inherently compelling. . . . The second rationale, perhaps more persuasive in its treatment of compulsion, viewed the warnings as prophylactic safeguards to combat the "*potentiality* for compulsion."[1]

The Court has undervalued the inherent compulsion rationale because it has been determined that a confession can be voluntary in spite of a *Miranda* violation. See, e.g., *Michigan* v. *Mosley*, 423 U.S. 96 (1975). It is by default that the potentiality-for-compulsion rationale offers the Fifth Amendment link to *Miranda*.

The State concedes that there is at least some potential for compulsion in every citizen encounter with the police. "Unless *Miranda* is to apply to all such encounters, it should be applicable only when the potential for compulsion reaches some legally significant threshold level." Grano, *supra* at 44. The teaching of *Miranda* is that at least stationhouse interrogation is proscribed because of its potential for compulsion. The *Miranda* Court, as the respondent has indicated, wrote of defendants being "thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures." Respondent's brief at 14; *Miranda* v. *Arizona*, *supra* at 457.

> Custodial stationhouse questioning is the context in which *Miranda's* parade of horribles is most likely to be

[1] Grano, *Rhode Island* v. *Innis*: *A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 Am. Crim. L. Rev. 1, 42 (1979) (emphasis original). The petitioner is appreciative of Professor Grano's efforts in presenting this carefully reasoned analysis which substantially furnished the content of its reply brief.

> found. Indeed, as the *Miranda* Court observed, police manuals suggest the interrogation room as the best place to deprive the suspect of every psychological advantage. At the opposite extreme, the parade of horribles is least apparent when the police engage in general on-the-scene questioning. The person questioned on-the-scene is not cut-off from the outside world or thrust into an unfamiliar, police-dominated atmosphere. While the police in such circumstances may engage in some feigned sympathy, trickery, and even hostility, they obviously do not have the opportunity to employ a menacing interrogation process in which patience and perseverance will eventually prevail. Moreover, street questioning, unlike stationhouse questioning, rarely is conducted by a skilled interrogator familiar with police manual techniques for undermining resistance. Grano, *supra* at 44.

However, as Professor Kamisar has noted, a no-pressure situation is not mandated by *Miranda*.[2]

The crucial question in *Innis* is where to locate the case on the scale of potential for compulsion. Thomas Innis was not apprehended and thrust into a police vehicle "where his attending officers wasted no time in inducing an inculpatory statement," as the respondent has characterized the facts. Respondent's brief at 38. Rather, Innis was informed of his rights, was not held incommunicado, and was neither threatened nor placed in an environment coercive beyond that inherent in any arrest. Certainly, any stress experienced by the defendant during his short ride in the wagon was greater than that which would be experienced during on the scene

[2] Kamisar, *Brewer* v. *Williams*, *Massiah*, *and Miranda*: *What is "Interrogation"? When Does it Matter?*, 67 Geo. L. J. 1 (1978).

questioning. The facts indicate that Innis was seated for a few minutes next to Patrolman Gleckman, who had been issued instructions not to question, intimidate, or coerce him in any manner (A. 22-23, 38). While the defendant was arrested and in custody under *Miranda*, he was not subjugated to the will of experienced interrogators nor was what occurred the type of relentless fear-producing situation which the Court found to be inherently coercive in *Miranda*. While some police chicanery might have been possible in the minutes when the defendant was seated next to the patrolman, the record does not support such a contention. The remarks in question were not made with the intent to elicit a response from Innis. Neither the Fifth Amendment nor *Miranda* ". . . requires the police, upon arresting a suspect, to assume the role of contemplative monks at all times while they are in the suspect's company." *State* v. *Innis*, ____ R.I. ____, 391 A. 2d 1158, 1167 (1978) (Kelleher & Joslin, JJ., dissenting).

The respondent has conceded that *Miranda* shields defendants not from the pressure of custody but from the pressure of custodial interrogation. Respondent's brief at 14. Since custody alone does not produce enough stress to trigger *Miranda's* prerequisites, interrogation must "consist of something more than verbal or nonverbal conduct designed or likely to elicit a response." Grano, *supra* at 46. The record does not support the respondent's argument that Innis was compelled to incriminate himself by leading the police to the gun. This Court has asserted that "admissions of guilt by wrongdoers, if not coerced, are inherently desirable." *United States* v. *Washington*, 431 U.S. 181, 187 (1977).

> All agree that after defendant requested an attorney, no one spoke to him, questioned him, or directed their remarks to him in any way. Statements volunteered by a suspect have never been thought to create constitutional problems. *State* v. *Innis*, *supra* at 1171 (Kelleher & Joslin, JJ., dissenting).
>
> The question, then, is whether the need for prophylactic fifth amendment protections in this context is great enough to justify the cost of discarding a perfectly voluntary statement. Had Innis [simply] blurted out that he wanted to return to the arrest scene to locate the gun, a *Miranda* issue would not even be present. The application of *Miranda* thus turns solely on the legal significance of the officer's remarks. Even if the "handicapped children" remarks can fairly be viewed as a form of questioning, their significance for *Miranda* purposes should depend upon the overall potential for compelling interrogation. Grano, *supra* at 47.

The State respectfully submits that the conversation which occurred in the police vehicle between the patrolmen and Innis' subsequent volunteered statement are not tantamount to the type of interrogation proscribed in *Miranda*.

II. Miranda's Per Se Exclusionary Rule Should Not Be Extended.

Even if the State were to concede that Innis was interrogated, the shotgun should not be excluded from evidence. The facts in the case at bar establish that the defendant voluntarily, knowingly, and intentionally relinquished his known rights. See *Johnson* v. *Zerbst*, 304 U.S. 458 (1938). At this critical waiver stage, *Innis* loses all resemblance to *Brewer* v. *Williams*, 430 U.S. 387 (1977), contrary to the argument advanced by the respondent. Respondent's brief at 21-24. In

Williams, there was no "break in the action" after Captain Leaming delivered his "Christian burial speech" and before the defendant led him to the child's body. The Court was careful to note that there was no evidence in the case that Williams voluntarily waived his rights, except for the fact that statements eventually were obtained. *Id.* at 41.

> When defendant [Innis] was arrested unarmed at 4:30 a.m., the logical inference was that he had secreted the shotgun nearby. The defendant was arrested about a block away from the Pleasant View School, and within a matter of a few hours the children would be making their way towards this institution. When defendant requested an attorney, all questioning ceased. And now defendant had returned to the scene and indicated a willingness to pinpoint the location of the dangerous weapon. Under the circumstances, what should Captain Leyden have done? [The State submits that] . . . he did the only thing he reasonably could have done. The defendant was taken out of the police car and for the fourth time that evening was given the full panoply of constitutional protection due him. The captain then asked defendant if he understood these rights and received an affirmative answer. When defendant insisted on locating the shotgun, Captain Leyden directed that the search for the weapon begin. *State* v. *Innis*, *supra* at 1171-1172 (Kelleher & Joslin, JJ., dissenting).

The State submits that Innis voluntarily and intelligently waived his right to counsel. *Miranda* held that an express statement can constitute a waiver, and that silence alone after such warnings cannot do so.

> That does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights. The courts must presume that a defendant did not waive his rights; the prosecution's burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated. *North Carolina* v. *Butler*, ___ U.S. ___, 60 L. Ed. 2d 286, 292 (1979).

This Court indicated in *Butler* that an explicit statement of waiver is not invariably necessary to support a finding that the defendant waived the right to counsel guaranteed by *Miranda*. Mr. Justice Stewart opined that "[e]ven when the right so fundamental as that to counsel at trial is involved, the question of waiver must be determined on 'the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused,'" *id.* at 293, and relied on *Johnson* v. *Zerbst*, *supra*, for support. The Court rejected the wooden *per se* rule applied by the North Carolina court and saw no reason to discard the totality-of-circumstances standard mandated by the requirements of federal organic law.[3]

In *Fare* v. *Michael C.*, ___ U.S. ___, 61 L. Ed. 2d 197, 212 (1979), this Court reiterated that the totality-of-circumstances test applies once *Miranda's* literal commands have been met. Further, "[t]his totality of the circumstances ap-

[3] See also *Fare* v. *Michael C.*, ___ U.S. ___, 61 L. Ed. 2d 197 (1979), where the Court again demonstrated its reluctance to extend exclusionary rules carried over from the Fourth Amendment to the *per se* rule which enforces *Miranda*. In *Fare*, the Court recognized the lawyer's essential role in the criminal justice system, but reversed a California Supreme Court judgment that would have extended *Miranda's per se* exclusionary rule.

proach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved." *Ibid.*

> The totality approach permits — indeed, it mandates — inquiry into all the circumstances surrounding the interrogation. This includes evaluation of . . . [the defendant's] age, experience, education, background, and intelligence, and into [*sic*] whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights. *Ibid.*

The respondent claims that Innis did not waive his rights and relies on a rigid *per se* analysis to support his argument. The record does not support such a conclusion under the totality-of-circumstances approach. As noted, the police took care to inform the respondent of his rights and to ensure that he understood them. The officers neither intimidated nor threatened Innis in any way. Their conduct was free from the parade of horribles that concerned the Court in *Miranda*. When Innis requested the assistance of counsel, the police did what they should have done under the circumstances; no one spoke to him, questioned him, or directed his conversation to him in any way. The State submits that statements *volunteered* by the suspect do not create constitutional problems. Further, the record indicates that the police did not attempt to exploit Innis' offer to lead them to the gun. Rather, he was taken out of the police car and again read the *Miranda* warnings on the street to ensure that he understood the consequences of his deliberate comments. Innis advised Captain Leyden that he understood what he was doing. It is clear that he spoke and acted freely, with full comprehension of his constitutional rights. If the Court were to hold otherwise, the worst fears of the *Brewer* dissenters would be realized and the result would be one which ". . . ought to be intolerable in any society which purports to call itself an organized society." *Brewer* v. *Williams*, *supra* at 415 (Burger, C.J., dissenting).

Conclusion.

For the reasons stated in its brief and in this reply brief, the State respectfully requests this Court to reverse the judgment of the Supreme Court of Rhode Island.

Respectfully submitted,

DENNIS J. ROBERTS II,
Attorney General,
STEPHEN LICHATIN III,
Special Assistant Attorney General,
Chief, Appellate Division,
Providence County Courthouse,
Providence, Rhode Island 02903.

In the Supreme Court of the United States

October Term, 1978
No. 78-1076

STATE OF RHODE ISLAND,

Petitioner,

v.

THOMAS J. INNIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER

GEORGE DEUKMEJIAN, Attorney General
of the State of California
ROBERT H. PHILIBOSIAN, Chief Assistant
Attorney General - Criminal Division
WILLIAM E. JAMES,
Sr. Assistant Attorney General

3580 Wilshire Boulevard
Los Angeles, California 90010
Telephone: (213) 736-2182

Attorneys for Amicus Curiae

Westside Law Publishers Santa Monica, California 213/451-1714

TOPICAL INDEX

TABLE OF AUTHORITIES

Constitutions

Rules

Miscellaneous

In the Supreme Court of the United States

October Term, 1978
No. 78-1076

STATE OF RHODE ISLAND,

Petitioner,

v.

THOMAS J. INNIS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF RHODE ISLAND

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The State of California files this amicus brief pursuant to the provisions of Rule 42(4) of the Rules of the Supreme Court of the United States.

The State of California has an interest in the resolution of the questions presented to this Honorable Court for review and in the scope of the rules promulgated in *Miranda v. Arizona* (1966) 384 U.S. 436 in aid of the provisions of the Fifth Amendment to the United States Constitution that no person "shall be compelled in any criminal case to be a witness against himself."

California appeared as a party before the Court in one of the companion cases to *Miranda* (*California v. Stewart*, No. 584, 384 U.S. 436, 497), and appearances have been made as a party and as amicus in cases raising *Miranda* issues before this Court since 1966. California joined with others in an amicus brief in *Brewer v. Williams* (1977) 430 U.S. 387, urging that the procedural ruling in *Miranda* be re-examined and overruled. As observed by Mr. Justice Blackmun, dissenting (p. 438), the issue did not have to be considered in that case. It is acknowledged that the same may be true in the instant case.

However, California is concerned with the resolution of the question, now ripe for decision, whether *Miranda* requires a per se rule of exclusion of all statements of a suspect in custody, who after receiving the warnings and invoking the right to counsel, thereafter knowingly and voluntarily waives the right and makes incriminating admissions.

Amicus is also concerned with the "expansion" of the concept of "interrogation" as that term was used in *Miranda* and with the application of the Sixth Amendment requirements as to counsel from *Brewer v. Williams, supra.*

The first issue that will be addressed by amicus will be the matter raised in the dissent in the instant case that,

> "The views expressed by the majority come perilously close to fulfilling the worst fears of the four Brewer dissenters, who expressed concern that the majority in Brewer was really holding that once a suspect has asserted his right not to talk without the presence of an attorney, '*It becomes legally impossible for him to waive that right until he has seen an attorney.*' . . . "

> (Emphasis added; *State v. Innis* (R.I. 1978) 391 App.2d 1158 at p. 1172.)

INTRODUCTION

Respondent, Thomas J. Innis, was found guilty after a jury trial of murder in the first degree, kidnapping and robbery. The matter is before this Honorable Court on the granting of the petition of the State of Rhode Island following a 3-2 decision of the Supreme Court of Rhode Island vacating the judgments of conviction and remanding the matter to the Superior Court for retrial.

The facts necessary to resolution of the constitutional questions presented in this case are not in serious dispute and amicus will rely on the statement contained in the Petitioner's Opening Brief, with record references.

The body of the victim, one John Mulvaney, a cab driver, was found in a shallow grave in Coventry, Rhode Island on January 16, 1975. Death had resulted from a shotgun blast to the back of the head.

Innis became a suspect and the police were informed that he was seen in an area of Providence carrying a sawed-off shotgun. A search of the area began.

Patrolman Robert M. Lovell of the Providence Police Department apprehended Innis in the early morning of January 17, 1975, at about 4:30 a.m.

Lovell placed respondent Innis under arrest and advised him of his constitutional rights pursuant to *Miranda.*

Thereafter Sergeant Francis J. Sears arrived at the scene of the arrest and also gave Innis his *Miranda* warnings.

In response to a call that respondent had been apprehended Captain John J. Leyden arrived and Innis was

again advised of his rights.

Following the Captain's warning Innis stated that he wanted an attorney.

The Captain then directed three officers, Gleckman, McKenna and Williams, to place Innis in the caged wagon and transport him to the central station.

The Captain also directed them not to question the defendant or intimidate or coerce him in any way.

While en route to the station Patrolman Gleckman, who had been on the force less than two years, began a conversation with Patrolman McKenna. Innis could hear the conversation within the vehicle.

Gleckman told McKenna that there was a school for handicapped children in the area of the search for the shotgun and he expressed fear that one of the children might find the gun and be injured.

Gleckman did not address Innis and he was not questioned in any way.

At this point Innis said, "Stop, turn around, I'll show you where it is."

McKenna then got on the "mike" and told the captain that they were returning and that Innis was going to show them where the weapon was.

The vehicle had traveled less than a mile and they returned to the arrest scene within minutes of leaving.

When Innis alighted from the wagon Captain Leyden again advised him of his rights and Innis expressed his understanding of those rights but that he wanted to show them where the weapon was because of the school that was in the area and the "small kids around." He was placed in the wagon and all cars proceeded to a nearby field and the

shotgun, which was the subject of the motion for suppression, was located.

The defendant did not testify at the voir dire and the facts are not disputed.

The trial judge ruled that the shotgun was admissible.

The majority of the Rhode Island Supreme Court held that Innis had exercised his *Miranda* right to counsel and that Gleckman's statement to McKenna constituted "interrogation" without a valid waiver of this right and that the weapon should have been suppressed.

SUMMARY OF ARGUMENT

In holding that the shotgun received in evidence in this robbery-murder case must be suppressed, the Rhode Island Supreme Court, by a 3-2 majority, in effect held that when a suspect in custody, after receiving *Miranda* warnings a number of times, asserts "his right not to talk without the presence of an attorney, it becomes legally impossible for him to waive that right until he has seen an attorney." (*State v. Innis, supra,* at p. 1172.)

Amicus urges that *Miranda* does not set forth any such judicial straitjacket on an informed suspect's right to change his mind for whatever purpose satisfies his interests, and free of compulsion, to voluntarily, intentionally and knowingly waive that right without the presence of an attorney.

In setting forth such a per se rule the holding below constitutes an unwarranted extension of the *Miranda* requirements and is contrary to the majority of the cases, federal and state, that have had recent occasion to consider the issue. To create such an inflexible rule would go beyond the requirements of the Fifth Amendment and the "totality of circumstances" approach to waiver ques-

tions. In this case, without any suggestion of coercion, the respondent voluntarily chose to speak and to tell the officers to turn around, that he would show them where to find the weapon.

This constitutes a knowing and voluntary waiver of the rights of which Innis had recently been advised a number of times, he was aware that his wishes in this regard would be scrupulously respected and that he did not have to speak. Under the facts and circumstances of this case, respondent waived his right to the presence of counsel when he spoke voluntarily and then expressly when again (for a fourth time) Captain Leyden advised him of his rights and he expressed his understanding of those rights and indicated that he wanted to show the officers where the weapon was located.

The Rhode Island Supreme Court was also in error in holding that the conversation between Officers Gleckman and McKenna constituted "interrogation" of respondent and in relying on the Sixth Amendment case of *Brewer v. Williams, supra,* 430 U.S. 387, for the rule that such conversation, not directed to respondent and without any intent to elicit incriminating statements from the accused, was violative of this Court's decision in *Miranda.*

The prophylactic rules announced in *Miranda,* representing a careful accomodation of the rights of the accused and the reasonable and legitimate needs of law enforcement would be, by such a rule as announced by the Rhode Island Supreme Court, transformed into "wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests," (*Michigan v. Mosley* (1975) 423 U.S. 96, 102.)

The trial court correctly ruled that the sawed-off shotgun was admissible and the Rhode Island Supreme Court was in error in holding to the contrary and its judgments should be reversed.

ARGUMENT

I.

MIRANDA DOES NOT REQUIRE A PER SE EXCLUSION OF STATEMENTS OF AN ACCUSED IN CUSTODY WHO, ON BEING ADVISED OF HIS RIGHTS, INVOKES THE RIGHT TO COUNSEL AND THEREAFTER VOLUNTARILY AND KNOWINGLY WAIVES THAT RIGHT

The Fifth Amendment to the Constitution of the United States, insofar as applicable herein, provides that no person "shall be compelled in any criminal case to be a witness against himself."

In 1966, a closely divided Court announced certain procedural guidelines to be applied to custodial interrogations of persons suspected of crimes. These included warnings that the person had a right to remain silent, that statements made could be used against him, and that he had a right to retained or an appointed attorney before any questioning.

This Honorable Court stated that a defendant could waive these rights but that such a waiver would have to be made voluntarily, knowingly, and intelligently. A reasonable and faithful interpretation of the *Miranda* opinion rests on the intention of the Court to adopt "fully effective means . . . to notify the person of his right of silence and to assure that the exercise of that right would be scrupulously honored." (*Michigan v. Mosley, supra,* 423 U.S. 96 at p.103.) Thus the giving of the warnings would *inform* the suspect of his rights and assure that any waiver was a knowing and voluntary one.

It was recognized that these procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected. (*Michigan v. Tucker* (1974) 417 U.S. 433, 444.)

Thus, while *Miranda* does not proscribe admission of voluntary statements of an incriminating nature, it does forbid admissions which are the result of *custodial interrogation* by the police of one who has not been advised of the right not to incriminate himself and to have the assistance of counsel in the exercise of that right.

And assurance was forthcoming that the decision (*Miranda*) would in no way create a constitutional straitjacket, that there should be no blanket prohibition against the admission of voluntary statements, or of a permanent immunity from further interrogation as would turn the *Miranda* safeguards into "wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests." (*Michigan v. Mosley, supra,* 423 U.S. 96, 102.)

The procedure to be followed once the warnings were given to a suspect in custody prior to and during interrogation were outlined in *Miranda* as follows (384 U.S. at pp. 473-475):

> "Once warnings have been given, the subsequent procedure is clear. *If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.* At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been invoked. *If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.* At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning . . . ."
>
> "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. *Escobedo v. State of Illinois,* 378 U.S. 478, 490, n. 14, 84 S.Ct. 1758, 1764, 12 L.Ed.2d 977." (Emphasis added, footnote omitted.)

The question as to whether a suspect in custody can thereafter waive his right after he has invoked his right to remain silent was answered by this Honorable Court in *Michigan v. Mosley, supra,* 423 U.S. 96.

This Honorable Court held that as to one who indicated a desire to remain silent the *Miranda* opinion cannot be sensibly read to create a per se proscription of indefinite duration upon any further questioning. It was said that a faithful reading of *Miranda* must rest on the intention of the Court to adopt fully effective means to notify the person of his right of silence and "to assure him that the exercise of the right would be scrupulously honored," that the critical safeguard in the passage from *Miranda* is the

right to cut off questioning. (*Michigan v. Mosley, supra,* 423 U.S. at p. 103.)

The concurring opinion of Mr. Justice White in *Mosley* (page 110, footnote 2) notes that *Mosley* did not speak to the issue of one who indicates a desire to consult counsel and a suggestion was made that a later decision to make a statement in such circumstances without counsel's presence could be viewed with skepticism, *i.e.,* a possible heavier burden on the party presenting the statement.

This Honorable Court in the later case of *Brewer v. Williams, supra,* 430 U.S. 387, expressly refrained from holding under the Sixth Amendment right to counsel that a person in custody could never waive his right to counsel once it was asserted, saying that,

> "The Court of Appeals did not hold, nor do we, that under the circumstances of this case Williams could not, without notice to counsel, have waived his rights under the Sixth and Fourteenth Amendments. It only held, as do we, that he did not." (*Brewer v. Williams, supra,* 430 U.S. at pp. 405-406.)

Mr. Justice Powell, concurring, said that the opinion of the Court made it explicitly clear that the right to assistance of counsel may be waived, after it has attached, without notice to or consultation with counsel.

Thus, the question as to whether a per se rule of exclusion applies to proscribe the admission of subsequent statements of a suspect in custody who has invoked his right to counsel is ready for decision.

Amicus submits that once a person in custody has been advised of his right to remain silent and his right to retained or appointed counsel and has invoked his right to counsel, he may thereafter, for reasons satisfactory to himself, knowingly, intelligently and voluntarily waive his right

and make statements and submit to questioning. Thereafter the prosecution bears a heavy burden to demonstrate that the waiver is knowing and voluntary but when this burden is met, the rule permitting admission of such statements conforms to the letter and spirit of *Miranda* and is consistent with the law as developed by this Honorable Court.

And this has been the holding of a majority of the federal and state courts that have recently had occasion to address the question.

The New Mexico Supreme Court in *State v. Greene,* 572 P.2d 935 (N.M. 1977), held that an accused person in custody, having invoked his right to have the presence of counsel upon being advised of his *Miranda* rights may subsequently waive his right to have counsel present during questioning, but, of course, the state has a heavy burden to demonstrate that the waiver is knowing and voluntary.

The New Mexico Court pinpointed two situations contemplated by the *Miranda* warnings, *i.e.,* (1) invocation of right to remain silent, in which case interrogation must cease and (2) invocation of right to have counsel, in which case the interrogation must cease until an attorney is present. The Court noted that this Court mentioned that continued questioning may result in admissible statements by the accused if the prosecution carries the heavy burden of demonstrating intelligent waiver of the right to counsel.

The New Mexico Court said that the first of these questions was answered by the decision in *Michigan v. Mosley, supra,* 423 U.S. 96, 101, 96 S.Ct. 321, 46 L.Ed.2d 313 (1951) holding that the invocation of the right to silence does not create a per se proscription upon further questioning, that the admissibility of statements

depends on whether the right to cut off questioning had been scrupulously honored.

However, that court noted that the holding of *Mosley* did not reach the second situation, where the right to counsel was invoked. After noting that since *Mosley* some jurisdictions have adopted a per se rule requiring advice of counsel (*i.e., State v. Boggs,* 16 Wash.App. 682, 559 P.2d 11 (1977)) the New Mexico Supreme Court rejected this view as unnecessarily rigid and beyond the scope and intent of the original *Miranda* decision and adopted what it termed the more flexible view expressed by the Ninth Circuit (*United States v. Pheaster,* (C. A. 9th Cir. 1976) 544 F.2d 353, 367-368, *cert. den.* (1977) 429 U.S. 1099) as follows:

> "'. . . . In *Mosley* the Court rejected a literal interpretation of *Miranda*, holding that the exercise of the right to remain silent does not preclude all further questioning. . . . Although the specific holding in *Mosley* is not direct precedent for the resolution of this appeal, *Mosley* does indicate both a recognition that the procedure set out in *Miranda* is not as clear as the language of that opinion might suggest and a willingness to impart a greater degree of flexibility in the application of *Miranda* to varying factual situations.
>
> "We have concluded that a waiver of rights under Miranda can occur despite an earlier demand to have an attorney . . . . The Government, of course, bears a 'heavy burden * * * to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.' [Citations omitted.]" (572 P.2d at p. 940.)

Most of the Federal Courts of Appeal that have had recent occasion to rule on the matter have held that a defendant who has requested counsel may thereafter waive his earlier request for counsel.[1]

In *United States v. Hauck* (C. A. 8th Cir. 1978) 586 F.2d 1296, the Court of Appeal said that although *Miranda* stated that questioning must stop once the right to counsel has been asserted, it also stated that questioning could thereafter continue if the defendant specifically waived the right to counsel. The Court also rejected a contention that in that case there was the same subtle coercion that was condemned in *Brewer.* (586 F.2d at p. 1298.)

---

[1] *United States v. Grant,* (C. A. 4th Cir. 1977) 549 F.2d 942.

Biddy v. Diamond (C. A. 5th Cir. 1975) 516 F.2d 118, 122, *cert. den.* (1976) 425 U.S. 950 [96 S.Ct. 1724, 48 L.Ed.2d 194].

United States v. Rieves (C. A. 5th Cir. 1978) 584 F.2d 740, 745, the defendant invoked his right to remain silent and asked to see an attorney; later initiation by defendant of dialogue with government agent affirmatively demonstrated that he wished to waive his right to remain silent.

United States v. Cobbs (C. A. 3rd Cir. 1973) 481 F.2d 196, *cert. den.* (1973) 414 U.S. 980 [94 S.Ct. 218, 38 L.Ed.2d 224], held even where law enforcement knew defendant had an attorney custodial interrogation without notice to attorney did not violate right to counsel or preclude admission of statements where defendant freely and intelligently waived right to counsel.

See also Coughlan v. United States (C. A. 5th Cir. 1968) 391 F.2d 371, *cert. den.* (1968) 393 U.S. 870, 895 [Ct. 159, 21 L.Ed.2d 139].

United States v. Hodge (C. A. 5th Cir. 1973) 487 F.2d 945, an arrestee can change his mind after requesting an attorney.

Moore v. Wolff (C. A. 8th Cir. 1974) 495 F.2d 35, court refuses to adopt a per se rule requiring suppression, (*see also* cases cited, pp. 36-37).

In *United States v. Rodriguez-Gastelum* (C. A. 9th Cir. 1978) 569 F.2d 482, 486, *cert. den.* (1971) 436 U.S. 919, the Ninth Circuit, in an en banc decision rejected the per se rule that once counsel has been requested a suspect can never change his mind and speak without an attorney being present.

See also United States v. Flores-Calvillo, (C. A. 9th Cir. 1978) 571 F.2d 512, in which a panel on rehearing, followed *Rodriguez-Gastelum, supra,* after having initially held that under *Mosley* a person in custody who asserted right to silence could waive it but that the waiver doctrine did not apply when the person had expressed a desire for counsel.

A majority of the states in recent decisions have also held that a defendant who asserted his right to counsel could thereafter voluntarily waive that right.[2]

It is submitted that *Miranda* does not foreclose an informed suspect from voluntarily waiving his previous exercise of the right to counsel. No rigid, inflexible rule is required by the language of *Miranda* and such would be

[2]*State v. Steelman* (Ariz. Sup. Ct. 1978) 585 P.2d 1213.

Battle v. State (Fla. 1976) 338 So.2d 1107.

Berryhill v. Rickets (Ga. 1978) 249 S.E.2d 197.

Korn v. State (Ind. 1978) 379 N.E.2d 444.

Lofton v. State (Ind. 1978) 378 N.E.2d 834.

People v. Young (Ill. 1978) 376 N.E.2d 739.

State v. Kellogg (Iowa 1978) 263 N.W.2d 539.

State v. Dominick (La. 1978) 354 So.2d 1316.

Ellerba v. State (Md. 1979) 398 A.2d 1250. (Maryland refused to adopt the minority rule, the so-called per se rule, which mandates exclusion of all statements given by an accused after counsel has been engaged unless counsel advised and given opportunity to attend when

contrary to the spirit of that decision as it has been applied over the years.

A defendant does not lose his right to make decisions in his own interest by invoking the right to counsel. Certainly a defendant, who may exercise his constitutional right to represent himself at the trial of guilt or innocence (*Faretta v. California* (1975) 422 U.S. 806) should not find himself unable to change his mind regarding counsel under *Miranda.* That decision should not mandate "installing counsel as the final arbiter of the privilege." (*Miranda v. Arizona, supra,* at p. 537, Mr. Justice White dissenting.)

statement made by defendant.)

Com. v. Watkins (Mass. 1978) 379 N.E.2d 1040, 1045.

Com. v. Santo (Mass. 1978) 376 N.E.2d 866.

People v. Parker (Mich. 1978) 269 N.W.2d 635, 637-638 (expressly rejecting a per se exclusionary rule but recognizing a difference between assertion of right to remain silent and assertion of right to counsel).

State v. Olds (Mo. 1978) 569 S.W.2d 745 (finding state did not meet its burden).

State v. Moore, 202 N.W.2d 740 (Neb. 1972).

Lee v. State (Okla. 1977) 560 P.2d 226, 233.

Steele v. Johnson (Ore. 1978) 586 P.2d 811, holding state had not born its burden.

Com. v. Myers (Pa. 1978) 392 A.2d 685.

Com. v. Peoples (Pa. 1978) 394 A.2d 956, 957-958.

State v. Pendergrass (S.C. 1977) 239 S.E.2d 750, 752

McPherson v. State (Tenn. 1978) 562 S.W.2d 210.

Williams v. State (Tex. 1978) 566 S.W.2d 919.

State v. Hohman (Vt. 1978) 392 A.2d 935 (held that state had not met its burden).

Lamb v. Commmonwealth (Va. 1976) 227 S.E.2d 737.

Schilling v. State (Wis. 1978) 271 N.W.2d 631.

II.

THE CONVERSATION BETWEEN PATROLMEN GLECKMAN AND McKENNA IN THE VEHICLE DID NOT CONSTITUTE INTERROGATION OF INNIS UNDER *MIRANDA* AND THE FIFTH AMENDMENT AND HIS VOLUNTARY STATEMENT CONSTITUTED A WAIVER OF ANY PREVIOUS INVOCATION OF THE RIGHT TO COUNSEL

Amicus has urged that a per se exclusion of any statement of a suspect in custody who has invoked his right to counsel is not required by a reasonable reading of *Miranda.* Amicus will now briefly address the two issues set forth in the majority opinion of the Rhode Island Supreme Court (*State v. Innis, supra,* 391 Atl.2d at p. 1161), whether (1) the defendant was interrogated within the meaning of *Miranda* prior to assisting in locating the shotgun and (2) if so, whether he voluntarily waived his rights under the Fifth Amendment.

The Rhode Island Court held that the conversation between Gleckman and McKenna constituted "interrogation" as that term was used in *Miranda* and likened the so-called "Christian burial speech" in *Brewer v. Williams, supra,* 430 U.S. 387 (which this Court said was "tantamount" to interrogation), to the conversation of the officers in this case, admitting that this constituted an "expansion" of the term "interrogation" as used in the Fifth Amendment context requiring *Miranda* warnings.

The Rhode Island Court put to one side the significant fact that *Brewer* was a Sixth Amendment case and that the right to counsel had attached because adversary judicial proceedings had commenced against the defendant. (See *Kirby v. Illinois,* (1972) 406 U.S. 682, 688.) That court also ignored the fact that the so-called "Christian burial speech" was directed to the defendant Williams, creating a form of compulsion, but more important, the "speech" was made for the admitted purpose of eliciting information of an incriminatory nature from a defendant against whom adversary judicial proceedings had been initiated and in the absence of counsel, a right which had attached under the Sixth Amendment.

In *Brewer,* the "speech" was "tantamount to interrogation" because it was *intended* to secure a response from the defendant and elicit incriminating information. In this case the officers were merely conversing with each other, this was the finding of the trial judge who heard the motion to suppress and there was no contrary evidence.

This Honorable Court restricted the decision in *Brewer* to the Sixth Amendment and spoke of the broad right of counsel which attaches when adversary judicial proceedings are instituted. This right does not require that one be in custody to be entitled to it or that he be subjected to interrogation as such or that there be compulsion.

(See *Massiah v. United States* (1964) 377 U.S. 201, 206.)

As the majority in *Brewer* said (*supra,* at p. 397):

> "Specifically, there is no need to review in this case the doctrine of *Miranda v. Arizona, supra,* a doctrine designed to secure the constitutional privilege against compulsory incrimination, . . ."

concluding that Williams was deprived of a different constitutional right — the right to the assistance of counsel.

The *Miranda* rules were intended to protect a suspect from being *compelled* to incriminate himself in the coer-

cive setting of custodial interrogation. *Miranda* requires that the suspect be informed of his right against self-incrimination and that this right would be scrupulously honored and that *questioning* would cease when he invoked his rights.

Amicus submits that "interrogation" as used in *Miranda* has not been "expanded" by *Brewer* and it should not receive any broader definition than originally set forth.

This Court's decision in *Miranda*, setting forth rules of procedure, defines "custodian interrogation" as follows:

> "By custodian interrogation we mean *questioning* initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." (Emphasis added.) (*Miranda v. Arizona, supra,* 384 U.S. at p. 444; *see also Oregon v. Mathiason,* (1977) 429 U.S. 492, 494.)

This meaning of interrogation is the accepted definition of that term, *i.e.*, questioning, inquiring.[3]

---

[3]Ballentine's Law Dictionary (3rd Ed.) defines interrogation as:

> "Propounding questions, questioning, especially a witness, a prospective witness, or one suspected of the commission of a crime."

"Webster's New International Dictionary (Second Edition, Unabridged) defines interrogate:

> "To question; esp. to question formally; to examine by asking questions; as to interrogate a witness."

And interrogation as:

> "Act of interrogating, or questioning; inquiry; also, a question put; an inquiry."

No case has suggested that the term "interrogation," as used in *Miranda*, would include conversation between two persons not directed to a suspect and without a design to elicit incriminating statements from one in a coercive custodial setting.

Any intimation in the majority opinion of the Rhode Island Supreme Court that Gleckman's conversation with McKenna was a clever "ploy" to secure an incriminating response finds no support in the record. It is inconceivable that Gleckman, an officer with less than two years experience, would take it upon himself to disobey a direct order of a superior officer, Captain Leyden, and attempt to devise such a scheme.[4]

It is evident that there was no impermissive custodial interrogation in this case and that any statement of the respondent in the vehicle was voluntary and not the product of compulsion or coercion.

---

[4]In fact, what Gleckman said to McKenna was apparently correct, *i.e.*, the nearby location of the school for handicapped children and the danger posed by the shotgun, and it was not an intentional misrepresentation to secure a response as in *Frazier v. Cupp* (1969) 394 U.S. 731, at p. 739, which misrepresentation was not held to be of sufficient significance to render inadmissible an otherwise voluntary confession.

See also United States v. Collins (C. A. 2d Cir. 1972) 462 F.2d 792, 797, which held mere plea to confess to prevent more killings, bloodshed, amounted to no more than an exhortation to reevaluate defendant's decision in that case to remain silent, and was not violative of *Miranda*.

And *United States ex rel. Henna v. Fike* (C. A. 7th Cir. 1977) 563 F.2d 809, in which the court rejected an attempt of the petitioner to draw a parallel between the detective's suggestion that he was looking for a missing man who was injured and the "Christian burial speech" in *Brewer, supra,* stating that the detective's suggestion was neither calculated nor coercive as was the behavior of the police in *Brewer. (See also United States v. Hauck, supra,* (C. A. 8th Cir. 1978) 586 F.2d 1296, 1298.)

The trial judge, who heard the witnesses, concluded that there was clearly a waiver when Innis spoke, "Stop, turn around, I'll show you where it is." Amicus submits that this was a voluntary act done with full knowledge of his right to remain silent and to have the assistance of counsel and constituted the waiver of which this Court spoke in the recent case of *North Carolina v. Butler*, ____ U.S. ____ [47 Law Week 4454, decided April 24, 1979].

In *Butler*, in rejecting an inflexible per se requirement of an express or written waiver of rights, this Honorable Court said,

> "An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of the waiver, but it is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case . . . ."

In this case, as in *Butler*, there is no question that Innis was adequately and effectively apprised of his rights, and, of equal importance, he was under no compulsion to speak at all, much less to make incriminating statements.

He already had been told by three officers of his rights under *Miranda* and, when he invoked the right to counsel, any questioning that would have taken place was cut off and his right was scrupulously observed, Captain Leyden ordering the custodians of the prisoner not to question or coerce him in any way. Innis must have heard this order as he apparently also heard the conversation between Gleckman and McKenna.

After he spoke, he was again given the *Miranda* warnings and expressly waived his rights and indicated he wanted to show the officers where the weapon was located.

A suspect may properly make an assessment of his interests and conclude, for reasons satisfactory to himself, that he should waive his right. His action may have been out of compassion (the trial judge commended him for it) or it could have been for a more selfish reason. The fact is he was under no compulsion to do anything.

Innis, having been informed of his rights and having invoked the right to counsel, made a voluntary and intelligent waiver of his previously invoked right.

Finally, the Rhode Island Supreme Court attempted to invoke the rule in *Wong Sun v. United States* (1963) 371 U.S. 471, and concluded that the discovery of the shotgun was the "fruit of the poisonous tree." It is submitted that *Wong Sun* is not applicable for there was no violation of a *constitutional* right. As this Court said in *Brown v. Illinois* (1975) 422 U.S. 590, 602, "Wong Sun thus mandates consideration of a statement's admissibility in light of the distinct policies and interests of the Fourth Amendment." It does not govern this case.

In any event, the major premise of the court below, that there was an illegality in obtaining the original statement, is fallacious and it follows that there is no "taint" to purge. Rejecting the premise, amicus must also reject the conclusion that is sought to be drawn therefrom.

It must be concluded that the shotgun, the object of the motion to suppress, a most reliable and trustworthy item of physical evidence, was properly admitted and presented to the trier of fact in this case, that there was no impermissible custodial interrogation in violation of *Miranda* and that the defendant voluntarily and with full knowledge of his

rights, waived his previously invoked right to counsel, and that the statements and the weapon were not the product of illegal police procedure.

CONCLUSION

The balance struck by *Miranda* was an extremely close one, five to four decision over strong dissents. The majority of the Court weighed the interest of society and law enforcement in "a proper system of law enforcement" and argued that the Court has always given ample latitude to law enforcement agencies in the legitimate exercise of their duties, concluding that the holding of the Court "should not constitute an undue interference with a proper system of law enforcement" and that the decision of the Court "does not in any way preclude police from carrying out their traditional investigatory functions." (*Miranda v. Arizona, supra,* 384 U.S. at p. 481.)

It is submitted that a rule that would exclude the weapon in this case from evidence on the ground that the voluntary statement of respondent was obtained in violation of this Court's holding in *Miranda* would most certainly interfere with law enforcement agencies in the performance of their investigative duties and would preclude the police from carrying out their traditional duties in a proper system of law enforcement.

Amicus submits that a sensible reading of *Miranda* does not require such a result.

However, if the rules developed by *Miranda* and its progeny require the suppression of this weapon for the reasons relied on by the Rhode Island Supreme Court, then amicus submits that THIS IS THE CASE for the re-examination of *Miranda* and the overruling of a judicial "straitjacket" and the removal of an "irrational obstacle" to legitimate police investigative activity.

Respectfully submitted,

GEORGE DEUKMEJIAN, Attorney General
of the State of California

ROBERT H. PHILIBOSIAN, Chief Assistant
Attorney General — Criminal Division

WILLIAM E. JAMES,
Sr. Assistant Attorney General

Attorneys for Amicus Curiae

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 78-1076

STATE OF RHODE ISLAND
Petitioner

-v.-

THOMAS J. INNIS

On Writ of Certiorari to the
Supreme Court of the State of Rhode Island

BRIEF OF THE ACLU FOUNDATION OF SOUTHERN CALIFORNIA, AND THE AMERICAN CIVIL LIBERTIES UNION, RHODE ISLAND AFFILIATE, AMICI CURIAE

FRED OKRAND
MARK D. ROSENBAUM
TERRY SMERLING
633 South Shatto Place
Los Angeles, Calif. 90005
(213) 487-1720

LYNETTE LABINGER
220 South Main Street
Providence, Rhode Island
02903
(401) 277-9300

Attorneys for Amici
Curiae

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 78-1076

STATE OF RHODE ISLAND
Petitioner

-v.-

THOMAS J. INNIS

On Writ of Certiorari to the
Supreme Court of the State of Rhode Island

BRIEF OF THE ACLU FOUNDATION OF SOUTHERN CALIFORNIA, AND THE AMERICAN CIVIL LIBERTIES UNION, RHODE ISLAND AFFILIATE, AMICI CURIAE

FRED OKRAND
MARK D. ROSENBAUM
TERRY SMERLING
633 South Shatto Place
Los Angeles, Calif. 90005
(213) 487-1720

LYNETTE LABINGER
220 South Main Street
Providence, Rhode Island
02903
(401) 277-9300

Attorneys for Amici
Curiae

INDEX

TABLE OF AUTHORITIES

Constitutional Provisions

Other Authorities

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 78-1076

STATE OF RHODE ISLAND
Petitioner

-v.-

THOMAS J. INNIS

On Writ of Certiorari to the
Supreme Court of the State of Rhode Island

BRIEF OF THE ACLU FOUNDATION OF SOUTHERN CALIFORNIA, AND THE AMERICAN CIVIL LIBERTIES UNION, RHODE ISLAND AFFILIATE, AMICI CURIAE

Interest of Amici Curiae */

The ACLU Foundation of Southern California and the American Civil Liberties Union, Rhode Island affiliate (ACLU), are engaged in the defense of the Bill of Rights. Much of their energies have been directed toward effectuating the provisions of the Bill of Rights concerned with the administration of criminal justice.

Protection of the Privilege Against Self-Incrimination within the context of custodial interrogation is essential to the preservation of our system of criminal justice. Amici believe that such protection is immeasurably enhanced by proper application of this Court's decision in Miranda v. Arizona, 384 U.S. 436 (1966). This is the issue to which Amici address themselves in this case. The briefs for the respective parties have directed attention to the particular facts of this case. Amici believes, as did the American Civil Liberties Union amicus curiae brief presented to this Court in Miranda v. Arizona, that they can best serve the

*/ The attorneys for the parties involved have consented to the filing of this brief. The letters of consent are on file with the Clerk of this Court.

This brief was prepared with the generous assistance of Robert C. Welsh and Ronald Collins. Many of the arguments herein presented are drawn from Schrock, Welsh & Collins, Interrogational Rights: Reflections on Miranda v. Arizona, 52 S.Cal. L. Rev. 1 (1978).

Court by presenting a more general argument addressed to the most salutory theory and application of Miranda. Toward this end, Amici focus on the arguments advanced by Petitioner in Argument III, A-D of its brief.

SUMMARY OF ARGUMENT

In Miranda v. Arizona, 384 U.S. 436 (1966), this Court held that the Privilege Against Self-Incrimination was violated when an accused's confession was obtained through police in-custody interrogation conducted without proper warnings. The Miranda holding marked a significant development in the constitutional law governing custodial interrogations. Whereas prior to Miranda the Court adjudged the admissibility of confessions according to the due process-totality of circumstances approach, Miranda held that police questioning must now conform to the requirements of the Fifth Amendment.† The determination that Miranda rests upon the privilege is not of mere academic interest, but vitally affects both the proper understanding and application of the decision.

Miranda's extension of the privilege to the stationhouse established new constitutional standards governing the taking

† The term "Fifth Amendment" in this brief is used as a short hand term for the Privilege Against Self-Incrimination clause of this amendment.

and use of confessional evidence. Standing for the high value that the Constitution places on individual dignity and integrity, the privilege seeks to protect the accused's rational faculty by requiring the government to inform the individual of his rights. For the reasons set forth below, the privilege requires not only that the accused be free from compulsion but that he receive the information he needs to make an informed and responsible choice between silence and waiver. Anything less is incompatible with the Fifth Amendment.

Reflection on the Fifth Amendment's concern for informed decision-making enables one to appreciate the close relationship between the privilege and the warnings laid down in Miranda. In most circumstances, therefore, a violation of the warnings will be presumed to constitute a violation of the privilege itself.

Once the close relationship between the privilege and the warnings is perceived, it becomes evident that the controlling standard for determining the admissibility of confessional evidence is the Fifth Amendment. Decisions of this Court have consistently held that evidence obtained in violation of the Fifth Amendment must be excluded. Hence, Petitioner's reliance on Fourth Amendment exclusionary rule cases is inapposite.

Recognition of the close relationship between the privilege and the warnings also makes clear that both incriminating statements elicited in violation of Miranda and their "fruits" will, in

most cases, be excluded. Given the constitutional basis for exclusion, no distinction can be made between testimonial and tangible "fruits."

ARGUMENT

I.

PETITIONER'S ARGUMENT THAT EVIDENCE ELICITED THROUGH NON-EGREGIOUS VIOLATIONS OF MIRANDA V. ARIZONA SHOULD NOT BE EXCLUDED IS BASED UPON AN INCOMPLETE UNDERSTANDING OF THE RELATIONSHIP BETWEEN THE WARNINGS REQUIREMENT AND THE PRIVILEGE AGAINST SELF-INCRIMINATION.

A. Summary of Petitioner's Argument.

Petitioner maintains that even if this Court should find that the Rhode Island police violated the strictures established in Miranda v. Arizona, 384 U.S. 436 (1966), by interrogating Respondent Thomas Innis after he had invoked his right to counsel, the resulting evidence should not be excluded from the prosecution's case in chief. Brief for Petitioner at 29-43. According to Petitioner, the Rhode Island Supreme Court was mistaken in reading Miranda as mandating the per se exclusion of evidence elicited in violation of the warnings requirement. Such an interpretation, Petitioner contends, is inconsistent with this Court's holdings in Harris v. New York, 401 U.S. 222 (1971), and Michigan v. Tucker, 417 U.S. 433 (1974), permitting the limited trial use of evidence secured without full warnings.

The crux of Petitioner's argument rests on language taken from this Court's opinion in Michigan v. Tucker wherein Mr. Justice Rehnquist stated that the "procedural safeguards [established in Miranda] were not themselves rights protected by the Constitution but were

instead measures to insure that the right against compulsory self-incrimination was protected." 417 U.S. at 444. See Brief for Petitioner at 32. In Petitioner's view, the denial of constitutional status to the Miranda warnings frees the Court from any obligation to exclude all products of custodial interrogations conducted without proper warnings. Instead, the Court may apply the exclusionary rule flexibly, depending on its assessment of the relative social costs and benefits involved:

> Consistent with Michigan v. Tucker, . . . a determination to apply the exclusionary rule should take into account the nature of the violation, the nature of the evidence located as a result of the violation, the effect of applying the exclusionary rule, balanced against the interests of justice and society in having guilt or innocence determined on the basis of trustworthy evidence.
> Brief for Petitioner at 33-34.

Petitioner's argument is premised upon an incomplete understanding of the holding in Miranda v. Arizona regarding the relationship between the warnings requirement and the privilege against self-incrimination as well as this Court's subsequent decisions in Harris v. New York and Michigan v. Tucker. For the reasons set forth below, this Court must reject Petitioner's argument that Miranda-violative statements may be routinely admitted in the prosecution's case in chief.

B. Miranda v. Arizona Extended the Privilege Against Self-Incrimination to Custodial Interrogation.

The central defect in Petitioner's argument lies in the assumption that because this Court concluded that a non-egregious violation of the Miranda warnings requirement does not entail a violation of the privilege against self-incrimination in certain limited circumstances, the same conclusion must hold true in all circumstances. Apparently, Petitioner would have this Court mandate the exclusion of evidence obtained in violation of Miranda only where there has been a "deliberate and flagrant abuse of the accused's constitutional rights, amounting to a denial of due process . . . ." Brief for Petitioner at 33, n. 16. What Petitioner has overlooked, it is submitted, is that with respect to the admission of confessional evidence and its fruits in the prosecution's case in chief, the privilege against self-incrimination and not the guarantee of due process provides the controlling constitutional standard.1/

1/ In Mincey v. Arizona, 437 U.S. 385 (1978), this Court held that involuntary statements made by petitioner must be excluded because elicited in violation of the Due Process Clause. However, the Court made clear that Due Process rather than the privilege was invoked because "the prosecution stipulated that the answers would be used only to impeach the petitioner if he took the witness stand." Id. at 397 n. 12. Where the prosecution seeks to introduce improperly obtained evidence in its case in chief, the privilege is controlling.

Whatever constitutional ambiguity may surround the decision in Miranda v. Arizona, it cannot be doubted that this Court extended the privilege against self-incrimination to custodial interrogation.2/ Mr. Chief Justice Warren, writing for the Court in Miranda, was explicit on this point:

> [T]here can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves. 364 U.S. 436, 467 (1966).

Turning to the context of custodial interrogation, the Chief Justice stated:

> We are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning. Id. at 461. See also Id. at 458, 463, 472, 474.3/

2/ Custodial interrogation, as the Court in Miranda made clear, extends beyond the confines of police stations. (See 384 U.S. at 444; Orozco v. Texas, 394 U.S. 324 (1969).

3/ The dissenters in Miranda also acknowledged that the decision "extend[ed] the Fifth Amendment's privilege against self-incrimination to the police station." 364 U.S. at 510 (Harlan, J., dissenting).

Nothing this Court has said or done since Miranda has cast doubt upon this aspect of Miranda's constitutional holding. Indeed, in Michigan v. Tucker, this Court reaffirmed that "Miranda, for the first time, expressly declared that the Self-Incrimination Clause was applicable to state interrogations at a police station ...." 417 U.S. 433, 443 (1974).

This essential teaching of Miranda--that police questioning must conform to the constitutional standards of the Privilege Against Self-Incrimination--has been overlooked by Petitioner. To be sure, one can find an occasional reference to the Privilege in Petitioner's Brief. See Brief for Petitioner at 32, 35, 36, 41. But Petitioner's argument fails to demonstrate an adequate understanding of the constitutional significance of extending the privilege to the stationhouse. Reflection on the policies and purposes advanced by the privilege, it is submitted, demonstrates why violations of the Miranda warnings requirement are, in most instances, tantamount to violations of the privilege itself, and hence, why the Court is not constitutionally at liberty to adopt a "flexible approach when applying the exclusionary rule to a case falling solely within the context of Miranda v. Arizona ...." Brief for Petitioner at 38.

C. The Principles and Policies of the Privilege Against Self-Incrimination and Their Applicability to Custodial Interrogation.

By extending the privilege to the stationhouse, the Miranda court required that governmental interrogation conform to the core policies of the Fifth Amendment.

Those policies, now applicable to the custodial interrogation setting, were most clearly enunciated by the Court in Murphy v. Waterfront Commission, 378 U.S. 52 (1964). Therein the Court declared:

> The privilege against self-incrimination "registers an important development of our liberty--'one of the great landmarks in man's struggle to make himself civilized.'" Ullmann v. United States, 350 U.S. 422, 426 [citations omitted]. It reflects many of our fundamental values and most notable aspirations .... 378 U.S. at 55 (footnote omitted).

Among the fundamental policies identified by the Court were,

> our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load," 8 Wigmore, Evidence (McNaughton Rev. 1961), 317; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a

private life," United States v. Grunewald, 233 F.2d 556, 581-82 (Frank, J., dissenting), revd. 353 U.S. 391 [citations omitted].... 378 U.S. at 55.

Clearly, all of these policies are threatened by the inherently coercive atmosphere, (384 U.S. at 458), of police questioning. Significantly, however, this Court in Miranda v. Arizona singled out concern for "the inviolability of the human personality," 384 U.S. at 460, as having special relevance to custodial interrogations:

> All these policies [of the privilege] point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government--state or federal--must accord to the dignity and integrity of its citizens. 384 U.S. at 460. See also Id. at 457.

A necessary consequence of extending the protections of the privilege to the stationhouse, this Court recognized in Miranda, was to impose more stringent constitutional requirements on police questioning than theretofore obtained under the due process totality of circumstances standard:

> In these cases, we might not find the defendants' statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest. 384 U.S. at 457.

Even the Miranda dissenters, speaking through Mr. Justice Harlan, recognized that "the privilege imposes more exacting restrictions than does the Fourteenth Amendment's voluntariness test." 384 U.S. at 511-12 (Harlan, J., dissenting) (emphasis added).

The "more exacting restrictions" which Mr. Justice Harlan referred to in his Miranda dissent can be appreciated by a comparison of the privilege with the due process guarantee. On the one hand, the dominant focus of this Court's pre-Miranda confessions decisions was "on the question whether the behavior of the State's law enforcement officials was such as to overbear [the accused's] will to resist and bring about confessions not freely self-determined . . . . Rogers v. Richmond, 365 U.S. 535, 544 (1961). The holding in Miranda v. Arizona, on the other hand, pointed out the constitutional importance of requiring the police to inform the accused of his rights in order to foster some "real understanding and intelligent exercise of the privilege." 384 U.S. at 469 (emphasis added).

Standing for the high value we as a society place on individual "dignity and integrity," 384 U.S. at 460, the privilege is not satisfied merely by insuring the absence of compulsion in the interrogation room. The privilege also seeks to protect the accused's rational faculty by requiring the government to supply the knowledge he needs to arrive at an informed and deliberate decision regarding whether to speak or invoke his right to silence. In other words, the privilege is concerned with both protecting the individual from coercion and with respecting him by furnishing the information he needs to make his own decision.

In Fifth Amendment contemplation, then, the individual is viewed as a moral agent capable of responsible choice. The Amendment's commitment to the idea of personal responsibility is undermined where the government violates the ocnditions of voluntary and responsible choice by keeping the existence of the privilege a secret. By its nature, the privilege must be asserted, claimed, pleaded, or waived. It is an active right that an accused person must know about to claim its benefit.

The necessity of knowledge sets the privilege apart from the traditional due process test. Under that test, the accused is portrayed as a passive ward of the court, who talked out of ignorance or weakness and who is subsequently saved from his ignorance or weakness by the exclusion of the confession at his trial. Not knowing that in constitutional contemplation he is a responsible decision-maker, the accused is simply unable to comprehend adequately the decision that interrogation places before him.

By contrast, the privilege's emphasis on the cognitive element in free and rational choice, mandates that the accused be informed of his constitutional rights. Whereas the due process approach tends to regard the accused as a hapless victim of custodial pressures, the privilege seeks to give the accused the information he needs to help himself in the interrogational setting. The privilege, thus, stands for the proposition that the Constitution is as concerned about ensuring governmental respect for individual integrity as it is about protecting suspects from compulsion.

Not only are the policies and principles behind the privilege and due process distinguishable, but the operation of each guarantee in the interrogation setting is also importantly different. Regarding the due process standard, the primary concern appeared to have been with preserving the integrity and fairness of the trial from the corrosive effects of involuntary confessions. Put another way, the gravamen of the defendant's constitutional complaint was the use of involuntary statements in the courtroom rather than the taking of such statements in the stationhouse. To be sure, the use of coercion by the police had always been regarded as a necessary condition for holding the Constitution to have been violated; but rarely was it regarded as a sufficient condition;4/ the actual violation was held to have occurred after the police had secured the incriminating evidence from the accused. In short, the constitutional objective of the due process guarantee--the fairness and integrity of the trial--was considered separate and distinct from the propriety of police behavior in the interrogation room.5/

4/ One notable exception to this view is Mr. Justice Frankfurter's opinion for this Court in Rogers v. Richmond, 365 U.S. 534 (1961), in which it was held that,

> confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand . . . . not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of

Part and parcel with the Court's decision in Miranda to extend the privilege to police questioning was the imposition of Fifth Amendment standards on the taking of incriminating statements at the stationhouse in addition to the use of such statements at the defendant's trial. As this Court emphasized in Murphy v. Waterfront Commission, 378 U.S. 52 (1964), the privilege governs both the taking and the use of confessional evidence:

4/ (cont'd)

> our criminal law: that ours is an accusatorial and not an inquisitorial system--a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth. Id. at 540-41.

5/ A classic example of this view is contained in Mr. Justice Harlan's dissenting opinion in Mapp v. Ohio, 367 U.S. 643 (1961). Distinguishing between the constitutional wrongdoing that occurs in the search and seizure context from that occurring in the confessions context, the Justice wrote:

> The pressures brought to bear against an accused leading to a confession, unlike an unconstitutional violation of privacy, do not, apart from the use of the confession at trial, necessarily involve independent constitutional violations. Id. at 684-85 (Harlan, J., dissenting).

> The constitutional privilege against self-incrimination has two primary interrelated facets: The Government may not use compulsion to elicit self-incriminating statements, see Counselman v. Hitchock, 142 U.S. 547; and the Government may not permit the use in a criminal trial of self-incriminating statements elicited by compulsion. See, e.g., Haynes v. Washington, 373 U.S. 503. 378 U.S. at 57 n.6.6/

More recently, it has been observed that,

> the Fifth Amendment not only excludes from use in criminal proceedings any evidence obtained from the defendant in violation of the privilege, but also is operative before criminal proceedings are instituted: it bars the government from using compulsion to obtain incriminating information from any person. Baxter v. Palmigiano, 425 U.S. 308,

---

6/ Indeed, as Justice Henry Friendly has admitted, once it has been conceded that "the protection [of the Fifth Amendment] has been moved forward from the trial and grand jury rooms to the point of arrest with all its accouterments, Counselman v. Hitchock, [142 U.S. 547 (1892)], would be an arguably strong datum that the mere taking of the statement violates a constitutional right." H. Friendly, Benchmarks 280 (1967) (footnote omitted).

327 (1976) (Brennan, J., concurring in part and dissenting in part).

Recognition that the privilege is violated by the taking of incriminating statements as well as by their use at trial underscores the Miranda Court's perception that the accused has a constitutional right to insist that law enforcement not interfere with the deliberative process by which he/she decided what to do about whatever criminal responsibility rests at his/her doorstep. Application of the privilege to the stationhouse means that the police must "respect . . . the dignity and integrity of its citizens," 384 U.S. at 460, by not violating the conditions of voluntary and rational choice.

D. The Relationship Between the Miranda Warnings and the Privilege Against Self-Incrimination.

However the Miranda warnings are labeled,7/ it is beyond doubt that their role in the constitutional plan envisioned by the privilege is to assure the viability of the accused's right to silence in the

---

7/ Compare Miranda v. Arizona, 384 U.S. at 443, 490, 491; Orozco v. Texas, 394 U.S. 324, 326 (1969); Schenckloth v. Bustamonte, 412 U.S. 218, 232 (1973); Michigan v. Tucker, 417 U.S. 433, 462-63 (Douglas, J., dissenting) with Michigan v. Tucker, 417 U.S. at 439; Fare v. Michael C., ___U.S.___, ___, 99 S.Ct. 3, 5, 58 L.Ed.2d 19, 23 (1978) (Rehnquist, J., Circuit).

stationhouse. See 384 U.S. at 467; Johnson v. New Jersey, 384 U.S. 719, 729-30 (1966); Brewer v. Williams, 430 U.S. 387, 396 (1977). The opinion of Mr. Chief Justice Warren in Miranda v. Arizona highlighted the close relationship existing between the warnings and the Fifth Amendment:

> We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crimes contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively appraised of his rights and the exercise of those rights must be fully honored.
> 384 U.S. at 467 (emphasis added).

This Court has consistently recognized that the Miranda warnings serve as "safeguards designed to protect the rights of the accused, under the Fifth and Fourteenth Amendments, to be free from compelled self-incrimination during custodial interrogation." Fare v. Michael C., ___U.S.___, ___, 47 U.S.L.W. 4771, 4772 (June 20, 1979). See Brewer v. Williams, 430 U.S. 387, 396 (1977); id. at 425 (Burger, C.J., dissenting); Oregon v. Hass, 420 U.S. 714, 722 (1975); Michigan v. Tucker, 417 U.S. at 433, 446.

Two vital functions performed by the warnings have been identified by this Court. First, the warnings furnish an accused with the information he needs to make a responsible decision in the interrogations setting: "For those unaware of the privilege, the [silence] notification is needed simply to make them aware of it---the threshold requirement for an intelligent decision as to its exercise . . . ." 384 U.S. at 468. Second, the warnings demonstrate the government's willingness to honor the exercise of the privilege by an accused: "Further, the warnings will show the individual that his interrogators are preared to recognize his privilege should he choose to exercise it." 384 U.S. at 468.

In Michigan v. Tucker, 414 U.S. 433 (1974), this Court declared that the Miranda warnings "were not themselves rights protected by the Constitution, but were instead measures to insure that the right against compulsory self-incrimination was protected." Id. at 444. As amici have noted, Petitioner relies upon this language to support the contention that no constitutional wrong is committed when courts admit the products of non-egregious Miranda violations.

As Amici have endeavored to demonstrate, there are persuasive reasons for believing that in many instances, if not most, a violation of the Miranda warnings will be tantamount to a violation of the privilege against self-incrimination. The high value the privilege attaches to personal autonomy and responsibility mandates that the accused be informed of his constitutional right to silence and the assistance of counsel. The warnings fulfill the promise of the privilege by ensuring

that free and rational choice will be respected by the police at the stationhouse. Hence, where the police fail to w rn the accused of his rights and to honor the invocation of those rights during the interrogation process, it is likely that the privilege has been violated as well.

Amici do not contend that in every instance where the police fail to comply with the Miranda warnings, the privilege has been violated. Indeed, the Miranda Court itself acknowledged that,

> we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straightjacket which will handicap sound efforts at reform, nor is it intended to have this effect. 384 U.S. at 467, quoted, in Michigan v. Tucker, 417 U.S. 433, 444 (1974).

It is equally evident, however, that the Court did not mean to imply that the warnings were mere subconstitutional implementations (see Monaghan, Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1 (1975)) which could be required or dispensed with in the Court's unbridled discretion. For in the same passage in which the Miranda Court conceded the possibility of alternatives to the warnings, it went on to declare:

> [U]nless we are shown other procedures which are at least

> as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed. 384 U.S. at 467 (emphasis added).

Contrary to the initially flexible tone in the passage quoted above, the Court is not actually contenancing a substitution for notification. Rather, the Court is recognizing the possibility of alternatives to the particular notification system adopted in Miranda. The Court is recognizing, in other words, that although the notification method may vary, the discretion to devise alternatives to the warnings is not without definite limits.

A fair reading of Miranda, it is respectfully submitted, leads to the conclusion that the close relationship subsisting between the privilege and the warnings requires that courts, absent a contrary showing by the State, adopt the presumption that law enforcement's departure from the Miranda warnings resulted in a violation of the privilege. This interpretation is not only superior to Petitioner's understanding of the holding in Miranda, it is also in keeping with this Court's post-Miranda holding Michigan v. Tucker, supra, upon which Petitioner bottoms its conception of the warnings.

In Tucker, the defendant was interrogated prior to the Miranda decision, although he did not come to trial until after the effective date of Miranda. This Court observed that the interrogation was conducted in conformity with the then governing requirements of Escobedo v. Illinois, 378

U.S. 478 (1964); indeed, the officers gave Tucker every warning subsequently required by Miranda except notice that he would be furnished with counsel if he could not afford to retain one himself. The statements at issue were a damaging series of remarks by one Henderson who Tucker identified as the source of an alibi. Mr. Justice Rehnquist, writing for this Court, held Henderson's statements to be admissible.

Mr. Justice Rehnquist, Amici respectfully submit rested his opinion on two grounds. First, it was observed that the Miranda warnings "were not themselves rights protected by the Constitution," 417 U.S. at 444, and hence the "failure to give interrogated suspects full Miranda warnings does not entitle the suspect to insist that statements made by him be excluded in every conceivable context." Id. at 451. Amici do not dispute this interpretation of Miranda. Indeed, Amici agree with the Justice that failure to supply Tucker with complete warnings did not constitute a violation of the privilege for the second ground identified in the opinion, namely, that at the time Tucker was interrogated by the police, the privilege had not yet been extended to the stationhouse; hence one cannot say that there was a constitutional violation in the taking of Tucker's statements:

> We consider it significant to our decision that the officers' failure to advise respondent of his right to appointed counsel occurred prior to the decision in Miranda. . . . [A]t the time respondent was questioned these police officers were guided, quite rightly by the principles established in Escobedo v.

Illinois, 378 U.S. 478 . . . (1964), particularly focusing on the suspect's opportunity to have retained counsel with him during the interrogation if he chose to do so. 417 U.S. 447.

Absent a constitutional violation in the taking of confessional evidence, the privilege does not prohibit the government from admitting that evidence--or in Tucker, the fruits of that evidence--at the defendant's trial.

Petitioner is therefore mistaken in reading the holding in Tucker as denigrating the importance of police compliance with the Miranda warnings. Although it is correct to say that in Tucker, law enforcement's departure from Miranda did not result in a violation of the privilege, that is not because the privilege and the warnings are not closely related to each other, but because the privilege had yet to be extended to the police station.8/

8/ This Court's decisions in Harris v. New York, 401 U.S. 222 (1971), and Oregon v. Hass, 420 U.S. 714 (1975), cannot be so easily reconciled with the analysis herein presented. If confessional evidence obtained through a violation of the privilege cannot be used for impeachment purposes, New Jersey v. Portash, ___U.S.___, 99 S.Ct. 1292, 59 L.Ed.2d 501 (1979), then, given the conception of the privilege advanced by Amici (See Argument I, C-D), evidence obtained through a violation of Miranda should, in most instances, be barred as well. To the extent that Harris and Hass are incon-

---

8/ (cont'd)

sistent with this result, Amici respectfully urges a reconsideration of those decisions.

II.

PETITIONER'S RELIANCE ON THIS COURT'S DECISIONS CONCERNING THE EXCLUSION OF EVIDENCE UNDER THE FOURTH AMENDMENT IS INAPPOSITE TO THE INTERROGATIONS CONTEXT WHERE EXCLUSION IS MANDATED BY THE FIFTH AMENDMENT'S PRIVILEGE AGAINST SELF-INCRIMINATION.

Petitioner contends that this Court should adopt a "flexible approach" (Brief for Petitioner at 38) toward the exclusion of evidence obtained from a violation of the Miranda warnings. Petitioner supports its contention by invoking decisions of this Court wherein it was held that the Fourth Amendment exclusionary rule "has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons." Brown v. Illinois, 422 U.S. 590, 600 (1975); quoted in Brief for Petitioner at 33.9/ Believing that the same application of the approach to the exclusionary rule should be extended to the Fifth Amendment context, Petitioner declares:

> Determination to apply the exclusionary rule [to violations of Miranda] should take into account the nature of the violation, the nature of the evidence located as a result of the violation, and the effect of applying the exclusionary rule, balanced against the interests of justice and society in having guilt or innocence determined on the basis of trustworthy evidence. Brief for Petitioner at 33-34.

9/ Other Fourth Amendment exclusionary rule decisions of this Court relied upon by Petitioner are United States v. Calandra, 414 U.S. 338 (1974); Stone v. Powell, 428 U.S. 465 (1976); United States v. Janis, 428 U.S. 433 (1976); and United States v. Ceccolini, 435 U.S. 268 (1978). See Brief for Petitioner at 29-39.

Amici respectfully submit that the considerations which Petitioner urges upon this Court in applying the exclusionary rule in the interrogation setting are contrary to the Fifth Amendment's unambiguous proscription against admission of evidence obtained in violation of the privilege. As this Court has consistently recognized, "the Government may not permit the use in a criminal trial of self-incriminating statements elicited by compulsion." Murphy v. Waterfront Commission, 378 U.S. 52, 58 n.6 (1964). See, e.g., Counselman v. Hitchcock, 142 U.S. 547, 586 (1892); Brown v. Walker, 161 U.S. 591, 604-606 (1896); Boyd v. United States, 116 U.S. 616 (1886); Malloy v. Hogan, 378 U.S. 1, 7 (1964); Kastigar v. United States, 406 U.S. 441, 444-445 (1972); Lefkowitz v. Turley, 414 U.S. 70, 78 (1973); Manness v. Meyers, 419 U.S. 449, 461 (1975). In United States v. Janis, 428 U.S. 433 (1976), this Court reaffirmed the privilege's exclusionary requirement:

> (T)he Fifth Amendment's command that no person "shall be compelled in any criminal case to be a witness against himself" renders evidence falling within the Amendment's prohibition inadmissible. Id. at 443.

There can be no doubt, then, that evidence obtained in violation of the Fifth Amendment, contrary to this Court's decisions under the Fourth Amendment, must be excluded as a matter of constitutional command. Hence, Petitioner's reliance on this Court's Fourth Amendment exclusionary rule decisions is misplaced. In United States v. Janis, supra, this Court sharply distinguished between exclusion under the Fourth and Fifth Amendments:

> In contrast to the Fifth Amendment's direct command against the admission of compelled testimony, the issue of admissibility of evidence obtained in violation of the Fourth Amendment is determined after and apart from the violation. 428 U.S. at 443.10/

10/ On the same point, Professors Dershowitz and Ely have written:

> (T)he Fourth Amendment . . . does not, in terms, provide for the exclusion of evidence secured in violation of it . . . . The Fifth Amendment, on the other hand, seems on its face to prohibit the Government from using compelled statements "against" the defendant. It is an exclusionary rule -- and a constitutionally created one. Accordingly, courts would seem less justified in carving exceptions out of the Fifth Amendment's exclusionary rule than out of the Fourth's.

Dershowitz & Ely, Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority, 80 Yale L.J. 1198, 1214-1215 (1971).

Petitioner's error lies in its failure to realize that each provision of the Constitution "provides an independent ground for suppression of statements. . . ." Brown v. Illinois, 422 U.S. 590, 606 n.1 (1975).

As this Court has made clear, application of the exclusionary rule depends upon the specific policies of the underlying guarantee:

> The exclusionary rule. . . . when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth. Id. at 601; quoted in Dunaway v. New York, ___ U.S. ___, ___, 99 S.Ct. 2248, 2254, 60 L.Ed.2d 824, 838 (1979).

Take as one example, Petitioner's claim that the trustworthiness of the evidence obtained in violation of Miranda should be a factor in the Court's decision whether to mandate exclusion.11/ Whereas the

---

11/ Petitioner's other claim for the admission of Miranda-violative statements, namely, that exclusion of probative evidence will make it more difficult to convict obviously guilty defendants, seems to have been based on an exaggerated view of the exclusionary rule's effect on the administration of justice. Recent studies conducted by the General Accounting Office and the Law Enforcement Assistance Administration show that very few cases -- less than one half of one percent -- are dropped because of improperly seized evidence

(CONTINUED NEXT PAGE)

probative value of evidence may play a role in the application of the Fourth Amendment exclusionary rule, it clearly has no part under the Fifth Amendment, as this Court made clear in Lego v. Twomey, 404 U.S. 477 (1972):

> The use of coerced confessions, whether true of false, is forbidden because the method used to extract them offends constitutional principles. . . . (T)he purpose a voluntariness hearing is designed to serve has nothing whatever to do with improving the reliabity of jury verdicts. . . . Id. at 485, 486.

The Petitioner seeks to support its contrary view of the exclusionary rule in the interrogations context on the basis of language from this Court's decision in Michigan v. Tucker, 414 U.S. 433 (1974). There, Mr. Justice Rehnquist invoked the deterrence rationale behind the Fourth Amendment to justify admission of

---

11/ (cont'd)
problems. These studies also indicate that the overwhelming majority of all motions to suppress are denied by the trial court. A fair conclusion to be drawn from these studies is that the exclusionary rule's social costs are not nearly as high as the rule's critics have made them out to be. See, Report by the Comptroller General, Impact of the Exclusionary Rule in Federal Criminal Prosecutions, (April 19, 1979); and K. Brosi, A Cross-City Comparison of Felony Case Processing (prepared for the United States Department of Justice, Law Enforcement Assistance Adminstration) (April, 1979).

Henderson's statements in Tucker's trial. Finding that the police had scrupulously adhered to the operative constitutional requirements, the Justice stated:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. . . . Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force. Id. at 447; quoted in Brief For Petitioner at 37.

As amici have already noted, given the particular circumstances surrounding Tucker, namely, that the interrogation took place prior to Miranda, this Court concluded that no violation of the privilege occured during the interrogation process. 417 U.S. at 447. Thus, Tucker's discussion of deterrence need not be taken to indicate that this Court is moving away from its previous holdings mandating the exclusion of all evidence obtained in violation of the Fifth Amendment. Tucker, then, is distinguishable from other cases involving departures from the Miranda warnings in which this Court has found that law enforcement's failure to comply with the warnings requirement constituted a violation of the privilege. In Orozco v. Texas, 396 U.S. 324 (1969), for example, this Court found that "use of [the defendant's] admissions obtained in the absence of the required warnings was a flat violation of the Self-Incrimination Clause of the Fifth Amendment as construed in Miranda." Id. at 326.

Since a violation of the Miranda warnings will, except in limited circumstances, constitute a violation of the privilege, the Fifth Amendment requires that the resulting evidence obtained by the police be excluded from the defendant's trial. In all but those limited circumstances, the constitutional mandate of Miranda is clear:

> (U)nless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him. 384 U.S. at 479; quoted in Brief For Petitioner at 29 n.14.

III.

THE "FRUIT OF THE POISONOUS TREE" DOCTRINE APPLIES TO THE VIOLATIONS OF MIRANDA V. ARIZONA.

Petitioner contends that, assuming arguendo the police violated Miranda in their interrogation of Innis, nothing in that decision mandates the exclusion of the seized weapon from Innis' trial. According to Petioner, "this Court . . . has never applied the [fruit of the poisonous tree doctrine of Wong Sun v. United States, 371 U.S. 471 (1963)] to Miranda violations . . . ." Brief For Petitioner at 39.

Amici respectfully disagree. The Miranda Court expressly declared that "no evidence obtained [in violation of the warnings requirement] . . . can be used against [the defendant]." 384 U.S. at 479 (footnote omitted). Petitioner seeks to dismiss this language as dictum, "since none of the Miranda cases involved the use of 'fruits' of unlawfully obtained statements." Brief For Petitioner at 30 n.14. This argument is not persuasive. As two noted commentators have aptly observed:

> Miranda did not purport to be an opinion limited to its precise facts. Indeed, the stated reason for granting certiorari in that case was because Escobedo v. Illinois -- which was limited to its facts -- had been "the subject of judicial interpretation" under which "state and federal courts, in assessing its implications, [had] arrived at varying conclusions." Miranda purported to "give con-

crete constitutional guidelines for law enforcement agencies and courts to follow." Thus, the opinion was deliberately structured so that the constitutional principles -- which grew out of the experience of many cases -- were set out before the Court set forth the specific facts of the cases before it. Dershowitz & Ely, supra, 80 Yale L.J. 1198, 1210 (footnotes omitted and brackets and emphasis in original) quoting Miranda v. Arizona, 384 U.S. at 442. See also Id. at 444.

In terms of the "fruit of the poisonous tree" issue, the breadth of this Court's Miranda holding was attested to by Mr. Justice Clark, who observed in dissent that "the Court further holds that failure to follow the new procedures requires inexorably the exclusion of any statement by the accused, as well as the fruits thereof." 383 U.S. at 500 (emphasis added).

Post-Miranda decisions of lower federal and state courts also confirm the applicability of the "fruit of the poisonous tree" doctrine to Miranda violations. See, e.g., Barker v. Estelle, 498 F.2d 625, 629 (5th Cir. 1974); United States ex rel. Sanders v. Rowe, 460 F.Supp. 1128, 1137-1138 (N.D. Ill., 1978); United States v. Massey, 437 F.Supp. 843, 860 (M.D. Fla., 1977); United States v. Pellegrini, 309 F. Supp. 250 (S.D.N.Y., 1970); United States v. Harrison, 265 F,Supp. 660 (S.D.N.Y., 1967); New Mexico v. Wheeler, 92 N.M. 116, 583 P.2d 480, 481 (N.M., 1978); Commonwealth v. Haas, 369 N.E. 2d

692 (Mass., 1977); see also Stone, The Miranda Doctrine in the Burger Court, 1977 S.Ct.Rev. 99, 117 n.97.

Miranda's close relationship to the privilege against self-incrimination also supports the application of the "fruit of the poisonous tree" doctrine to violations of the warnings requirement. See Pitler, "The Fruit of the Poisonous Tree", Revisited and Sherpardized, 56 Minn. L.Rev. 579, 619 (1968). At least since Counselman v. Hitchcock, 142 U.S. 547 (1892), the Court has recognized that the Fifth Amendment protects "against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of the crime and sources of information which may supply other means of convicting the witness or party." Id. at 586; accord Murphy v. Waterfront Commission, 378 U.S. 52, 79 (1964). This Court has not departed from the teaching of Counselman: "[T]estimony may be suppressed, along with its fruits, if it is compelled over an appropriate claim of the privilege." United States v. Madujano, 425 U.S. 564, 576 (1976); accord Lefkowitz v. Turley, 414 U.S. 70, 78, 84 (1973); Kastigar v. United States, 406 U.S. 441, 444-445 (1972).12/

Furthermore, this Court has applied the "fruits" doctrine to tangible as well as testimonial evidence -- a point which

---

12/ The Court has even applied "the fruit of the poisonous tree" doctrine to violations of the judicially-created McNabb-Mallory rule. See, Harrison v. United States, 393 U.S. 219, 222 (1968).

belies Petitioner's claim that "real" evidence should be exempted from the ban because "it carries its own indicia of reliability." Brief For Petitioner at 43. In Mathis v. United States, 391 U.S. 1 (1968), tax-related documents were excluded by the Court because they were obtained in violation of Miranda. Id. at 205.13/ Last Term, this Court in Dunaway v. New York, ___ U.S. ___, 99 S.Ct. 2248 59 L.Ed.2d 501 (1979), indicated that sketches made by the accused would be excluded from his trial if found to be obtained in violation of the Fifth Amendment, despite the probative value of such evidence. Id. at 2255. In the words of Mr. Justice Frankfurter, writing for the Court in Rogers v. Richmond, 365 U.S. 534 (1961), confessional evidence is excluded "not because [it is] unlikely to be true but because the methods used to extract [it] offend" the Constitution. Id. at 540-541. Therefore, physical evidence is no more deserving of an exemption from the "fruit of the poisonous tree" doctrine than so-called testimonial evidence; to the extent that both kinds of evidence are derived from a violation of the Fifth Amendment, they must be excluded from the defendant's trial.

13/ The "fruits" doctrine has been applied to bar the admission of tangible evidence seized in violation of Miranda. See, e.g., United States v. Massey, 437 F.Supp. 843 (M.D. Fla. 1977); New Mexico v. Wheeler, 92 N.M. 116, 583 P.2d (N.M., 1978).

CONCLUSION

For the above stated reasons, amici respectfully urges the Court to reject the arguments advanced by Petitioner as set forth in Part III, A-D of its brief.

Respectfully submitted,

FRED OKRAND
MARK D. ROSENBAUM
TERRY SMERLING
LYNETTE LABINGER

Attorneys for
Amici Curiae